

THE RESOLUTION OF LABOUR CONFLICTS

An International Comparison

by

Ralf Rogowski

A thesis submitted in fulfillment of
the requirements for the degree of

DOCTOR OF LAWS

at the European University Institute
Florence

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INTRODUCTION

This study began as an account of judicial institutions of labour conflict resolution in the tradition of comparative law and empirical socio-legal research. By looking at labour courts and equivalent judicial institutions in France, Germany, Great Britain and the United States, it became apparent that labour conflict resolution at the judicial level is linked in many respects to pre-judicial processes. Thus the study was expanded to include institutions at the company level (grievance or dispute procedures, arbitration and negotiation procedures) as well as collective bargaining institutions. However, not only do these non-judicial institutions differ widely between countries; they also operate under different premises in the industrial relations system than labour courts or other institutions which form part of the judicial system. A socio-legal perspective which looks at industrial relations procedures simply as pre-judicial procedures and which employs the methods of judicial research, became insufficient to study the functions and processes of labour conflict resolution within the industrial relations system.

The present analysis adopts therefore a systems theoretical approach which assumes strict separation and operational closure of both the legal system and the industrial relations system. The study presupposes that non-judicial labour conflict resolution is closely linked to the industrial relations system. In order to justify this presupposition a theory of the industrial relations system, in which the function of labour conflict resolution is determined, had to be developed.

The general theory of social systems, which encounters a paradigm shift from structural functionalism to a theory

of communication circuits (1), has already been used to analyze the legal system as an autopoietic social system (2). However, autopoietic systems theory has so far not been applied to industrial relations. The following study attempts to show how the application of this theory can contribute to the understanding of both industrial relations and labour conflict resolution.

Chapter I outlines the major characteristics of an industrial relations system as an autopoietic social system. Previous attempts to apply Parsonian systems theory to industrial relations, in particular the attempt of John Dunlop, are criticized from the perspective of a Luhmannian concept of autopoietic social systems. The chapter discusses Luhmann's conception of a social system in general in order to describe industrial relations as a social system. Thereafter I propose a model of industrial relations as a social system in which its essential components are outlined.

Chapter II discusses functions of labour conflict resolution in an industrial relations system. Labour conflict resolution is described as an immune system of the collective bargaining system. The tripartite structure of many procedures of labour conflict resolution is analyzed as representing corporatist arrangements which characterize industrial relations in general.

Chapter III analyses labour conflict resolution in workplace industrial relations. It compares company dispute procedures in France, Germany, Great Britain and the United States.

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- 1) The major work which represents the paradigm shift in the theory of social systems is Luhmann 1984a. See also Willke 1987.
 - 2) See on the operational closure and the autopoietic nature of the legal system Teubner 1989. See also Luhmann 1987d: 354-363; 1986b and 1981a.

Chapter IV analyses labour conflict resolution at the judicial level. It compares labour courts and equivalent judicial institutions in the four countries.

Chapter V contains remarks on the role of law in labour conflict resolution. It emphasizes the limits of legal regulation in labour law and its dependency on self-regulation processes within the industrial relations system. The case of labour conflict resolution is used to illustrate the concept of reflexive labour law.

A few remarks on methodology might be added. The study uses qualitative rather than quantitative methods. It does not present new empirical data on labour courts and grievance procedures which is representative in a statistical sense (3). Nevertheless, the empirical material of the study attempts to increase knowledge of organizational reality and operations of labour conflict resolution.

Three sources of data have been used. Firstly, information was gathered through observations and interviews at labour courts and other labour conflict institutions. The research was started with an analysis of forty cases of the Berlin labour court (4). The author gained further insights into the operations of the Berlin court while serving for three months as an assistant and articulated clerk at this labour court in the beginning of 1989. During the

3) Studies which can claim to present representative empirical data on labour courts are Dickens et al. 1985 for Great Britain and Falke et al. 1981 and Rottleuthner 1984 for West Germany.

4) This research was carried out at the Wissenschaftszentrum Berlin together with Erhard Blankenburg and Siegfried Schönholz. See Blankenburg et al. 1978 and 1979.

course of research five other labour courts were visited in Germany.

Data and material about the U.S. were gathered during a year of research studies at the University of Wisconsin in 1980/81 which led to a separate report (5). This research was continued and updated during two further stays in autumn 1984 and 1988. The following departments and agencies were visited in Washington D.C.: the Equal Rights Division of the Department of Justice, the Bureau of Labor Statistics in the Department of Labor, the headquarters of the Federal Mediation and Conciliation Service (FMCS), the National Labor Relations Board (NLRB) and the AFL/CIO. Arbitration hearings were attended in Wisconsin and California and visits were made as well to the NLRB office in Milwaukee.

Data on the employment protection system in Great Britain were collected during four stays as visiting fellow of the Industrial Relations Research Unit of the University of Warwick between 1983 and 1988. Additional material has been gathered since the author started to teach employment law at Lancaster University in 1989. Interviews were conducted with 20 full-time and part-time chairmen of five industrial tribunals. These interviews were combined with visits to the respective regional industrial tribunals where hearings were attended. During these visits it was possible to arrange interviews with the Presidents of the industrial tribunals in England and Wales and the Scottish industrial tribunals. In addition, the author interviewed the administrative supervisor of industrial tribunals at the Department of Employment, and three senior ACAS officers who were successively in charge of individual conciliation at the ACAS headquarter in London. Interviews with individual ACAS conciliators were conducted at the ACAS regional office in Birmingham. Interviews with personnel managers and shop

5) Rogowski 1981.

stewards relating to their experiences with company dispute procedures were conducted during a visit to the Ford motor plant at Canley in Coventry.

Utilization of both the national judicial statistics and the internal registers of the particular labour conflict resolution institutions provided a second source of valuable data. Statistics on German and French labour courts are published in the German Bundesarbeitsblatt and the French Annuaire statistique de la justice. Statistical information on the British industrial tribunal system are contained in the Employment Gazette, the ACAS Annual Reports and the Fact Sheets of the Central Office of the Industrial Tribunals. In the U.S. some data on grievance procedures can be found in evaluations of collective bargaining agreements by the Bureau of Labor Statistics prior to 1980; information on caseload developments are reported by the NLRB and the FMCS in their Annual Reports.

A third source of data for this study was the wealth of industrial relations research on grievance procedures and socio-legal studies of labour courts and employment protection. This material has been widely used and occasionally reinterpreted by applying the concepts of reflexive labour law and autopoietic industrial relations. In this respect this study can be understood as a contribution to the development of an alternative systems theoretical approach to the study of law and society, and of industrial sociology.

CHAPTER I

INDUSTRIAL RELATIONS AS A SOCIAL SYSTEM

Like other social research, industrial relations research employs various frames of reference. In general, a distinction can be drawn between approaches which focus on actors and institutions and those which concentrate on systemic and structural aspects. The first path is taken by action theory and pluralist or institutionalist theories and the second by Marxist or political economy approaches and also by systems theory (1).

The first chapter will be devoted to a discussion of the second strand of theorizing of industrial relations. It is particularly concerned with systems theory in industrial relations research which has been the most influential approach in both national and comparative accounts of industrial relations since the 1950s. In particular John Dunlop's "Industrial Relations Systems", published in 1958 (2), had a lasting impact on national and international industrial relations research (3). His systems theory approach, which was inspired by Talcott Parsons' theory of structural functionalism, is the background against which an alternative approach to the systems theoretic conceptualization of industrial relations, based on Niklas Luhmann's work on social systems, will be developed.

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- 1) See the classification of frames of reference in industrial relations research in Bean 1985: 1 ff.
 - 2) Dunlop 1958. Dunlop still subscribed to his systems-theoretical approach in the 1980s. The main theoretical chapter "An Industrial Relations System", designed in 1958 as an introduction to his comparative study of sectors of national industrial relations systems, was reprinted without alterations in his collection of articles on "dispute resolution" in Dunlop 1984 as ch. 1.
 - 3) See only Schienstock 1982: 32-59 and Hyman 1989, ch. 5.

A Critique of Dunlop's Systems Theory of Industrial Relations

Dunlop justifies his usage of systems theory with direct reference to Parsonian structural functionalism. He considers Parsons' systems theory in general, and the analysis of the economic system as social system in particular, to be "suggestive for organizing insights and observations about the industrial-relations aspects of behavior in industrial society" (4). He praises Parsons' systems theory in particular because its application helps "to provide analytical meaning to the idea of an industrial relations system" (5). Systems theory can advance beyond previous approaches in industrial relations research, which Dunlop disqualifies as "classifications in the spectrum of labor peace and warfare".

Dunlop is inspired by Parsonian theory after its complete systems-theoretical turn, as outlined in Parsons' and Smelser's "Economy and Society" of 1956. Parsons' theory developed in three phases: from the study of the structure of social action as voluntaristic, non-deterministic action (6) to an analysis of the structure of social interaction as the basis of society as a social system (7) and then into a deductive application of so-called pattern variables and generalized media of communication in order to describe social systems (8). Initially, Parsons' analysis of the structure of society was characterized by a tension between action theory and systems theory, a tension which was resolved after the publication of "The Social System" (1951), and in particular after

4) See Dunlop 1958: 5.

5) Dunlop 1958: 3.

6) Parsons 1937.

7) Parsons 1951.

8) Parsons 1955, Parsons and Smelser 1956, and most of the "late work" of Parsons.

"Economy and Society" (1956 with N. Smelser), in favour of systems theory (9). The emphasis shifted from developing a systems theory based on conditions of social interaction to constructing social systems according to functional imperatives derived from a general scheme of pattern variables.

Social action is conceived after Parsons' systems-theoretical turn as the result of a combination of structural forces of the social system. Social action is constructed through a combination of four "pattern variables" which describe functional imperatives: adaptation, goal-attainment, integration and latent-pattern maintenance.

These pattern variables, known as the AGIL scheme, represent not only the conditions for social action but also describe both the functions of the main social subsystems and the functions of the surrounding systems. Thus, the four main social subsystems of society are each characterized by one of the four functions: the economy by adaptation, the polity by goal-attainment, law and other mechanisms of social control by integration and "the locus of cultural and motivational commitments", e.g., family and cultural institutions, by latent-pattern maintenance (10). Furthermore, the surrounding systems are also characterized by these functions. Whereas the social system is characterized by integration, the cultural system is

9) An insightful and informative discussion of Parsons "systems-theoretical turn" can be found in Habermas 1981, Vol. II, pp. 297-443. Habermas criticizes Parsons for his deficit in "action theory", which Habermas alleges to result in neglecting the analysis of the lifeworld context of social systems. However, Habermas' criticism is made "in defense of the subject" in the analysis of society. Thus, despite his integrative theory building, it is in fact Habermas who limits the theorizing of society and excludes theories which are not centered around subjects and their "communicative actions".

10) Parsons and Smelser 1956: 46-53.

characterized by latency, the personality system by goal-attainment, and the behavioural organism by adaptation.

Parsons' theory of society includes both an analysis of the structure of society, based on the AGIL scheme, and a theory of social evolution. The theory of evolution is based on a concept of societal modernization which is characterized as a process of functional differentiation of the social system into subsystems. The social system differentiates subsystems which are specialized to fulfill functions for the system at large. Social systems also create integrative mechanisms which link the functionally differentiated subsystems (11). Primitive societies are characterized according to Parsons by a low degree of differentiation into social subsystems whereas modern societies are characterized by structural differentiation of the economic, the political, and finally the cultural system, respectively achieved by the Industrial Revolution, the Democratic Revolution, and the Educational Revolution (12).

Dunlop's starting point is to call the industrial relations system "an analytical subsystem of an industrial society on the same logical plane as an economic system" (13). This, however, deviates from a Parsonian view in which the economic system is one "functional" subsystem of the overarching social system when it is decomposed according to the four functional imperatives. For Parsons, the industrial relations system can only be a subsystem of a subsystem, most likely a subsystem of the economy. Thus, the industrial relations system cannot be on the "same logical plane" as the economic system.

11) Parsons 1975: 43-45.

12) See Parsons 1971 on the theory of the three revolutions separating early from late modernization.

13) Dunlop 1958: 5.

In line with Parsons' theory of social evolution Dunlop's theory of industrial relations focuses on differentiation and modernization processes both in society and in industrial relations. Dunlop calls industrial societies "modern" when relations of managers and workers are formally arranged outside the family, when these relations are distinct from political institutions, and when the industrial relations system has an existence separate from the economic system.

In a "note" added to his outline of basic features of an industrial relations system Dunlop offers the following application of Parsons' differentiation concept and his four functional imperatives to the study of industrial relations. A quotation from this note demonstrates Dunlop's use of systems theory. In addition it introduces the main system components of Dunlop's own conception of an industrial relations system:

"The functional differentiation of an industrial relations system and the corresponding specialized structures or processes may be defined as follows: (1) Adaptive - The regulatory processes or rule-making in which the specialized output is a complex of rules relating the actors to the technological and market environment and the frequent changes which pose problems of adaptation to the actors. (2) Goal Gratification - The polity or political functions in the subsystem are specialized toward the contribution of survival or stability of the industrial relations system and to survival and stability of the hierarchies of the separate actors which is requisite for the attainment of goals by the actors. (3) Integration - The function of maintaining solidarity among the actors in the system is contributed by the shared understandings and common ideology of the system relating individual roles to the hierarchies and hierarchies to each other in turn. (4) Latent-pattern Maintenance and Tension Management - The function of preserving the values of the system against cultural and motivational pressures is provided by the role of the expert or professional in all three groups of actors in the system" (14).

Dunlop uses Parsons' "pattern variables" as a classification scheme for the presentation of system

14) Dunlop 1958: 30.

components ("rules", "hierarchies", "ideologies", and "experts") which he considers relevant to his comparison of national industrial relations systems. However, Dunlop subscribes only formally to Parsons' ideas. In fact, he does little more than present his own understanding of industrial relations in the Parsonian language of the AGIL scheme. Neither in the theoretical outline nor in the comparative study do Parsons' insights in the four functional imperatives guide Dunlop's conception of an industrial relations system.

Dunlop's conception is centered around four "elements" which appear in various constellations in the above quotation: actors, contexts, ideologies, and rules. The separate existence or "autonomy" of industrial relations systems is shaped by these four "elements". Dunlop discusses them separately in his theoretical outline, in which he characterizes the "elements" as follows: the three main actors are management, workers and government agencies, contexts consist of technology, market constraints, and the power distribution in society, and the ideologies of the actors must be compatible in order to permit a common set of ideas which allocate acceptable roles to the actors. The last, and most crucial "element" in Dunlop's theory of autonomous industrial relations, is the concept of rules governing the relations of industrial actors. This body of rules, which includes rules on procedures for the establishment and administration of substantive rules, constitutes "the center of attention in an industrial-relations system" (15). In Dunlop's view, the specific character of industrial relations systems derives from rule-making independent of decision-making in the economic system.

Dunlop's "elements" have been widely discussed in industrial relations theory. Shalev, for example,

15) Dunlop 1958: 13.

criticizes Dunlop for a meaningless use of the ideological factor: "... his materialistic theoretical bias, explicitly seeking in 'technological and market forces' rather than 'political and ideological considerations' the key to national diversity in industrial relations, precluded meaningful utilization of ideology as an important variable." (16) Other authors argue that the element "actors" needs further differentiation. Employees should be divided into organized and non-organised employees and employers into employer associations and single members (17). However, these authors misunderstand Dunlop's abstract notion of the tripartite structure of actors. As part of the tripartite relationship, each actor is conceived in Dunlop's model as a complex and hierarchically ordered entity whereby their respective hierarchies influence - and are influenced by - rule-making and the substance of the rules of the industrial relations system (18).

Nevertheless, Dunlop's elements must be criticized for a lack of theoretical deduction. There is no definition of "element" in his theory, and it is probably impossible to find a unifying characteristic of those heterogeneous factors which Dunlop calls elements. Dunlop reveals a lack of rigour in this respect in his theoretical discussion.

The theoretical and practical limits of Dunlop's systems-theoretical endeavour to analyze the industrial relations system can be demonstrated with respect to his analysis of the unity of the industrial relations system. In the last section of his theoretical chapter Dunlop tries to show how differentiation within the AGIL pattern of Parsons' functional imperatives contributes to establishing the "unity" of an industrial relations system:

16) Shalev 1981: 251.

17) For references see Schienstock 1982: 40-46.

18) See also Schienstock 1982: 40.

"It can be seen how each of these functional differentiations contribute to each other and to the unity of an industrial-relations system. (A-G) The rule-making contributes to the attainment of stability and survival, and stability in turn requires a grid of rules. (A-L) The technical problems involved in rule-making contribute to enhance the role of the professional or expert, and his role in turn produces a reduction of tension (a literal drawing of the "heat") among the actors and is the repository and defender of the values of the system. (G-I) The attainment of stability and survival requires shared understandings relating the actors to each other, and an effective integration contributes to the achievement of stability and survival. (L-I) The reduction in tensions and the preservation of values contributed by the professionals is a force for integration, and the shared understandings contribute toward enhancing and maintaining the role of the professional or expert. The functional differentiations of the system reinforce each other and unify the industrial-relations system." (19)

Dunlop, like Parsons, discusses the problem of unity as a problem of structure. Unity is conceived in this forced application of the four pattern variables as a product of rather static links among the system components which are supposed to reinforce each other and thus to contribute to system maintenance ("stability", "survival", "integration"). However, achieving unity does not seem to be a problem for the system. The links among the system components miraculously unify the system.

In fact, unity in this discussion is merely the construct of an external observer. It is not analyzed as a vital concern for the industrial relations system itself. Dunlop's analysis conveys the impression that the problems of the system derive from external rather than internal sources. It is beyond Dunlop's sociological imagination that threats to the unity and, indeed, to the existence of the industrial relations system itself could derive from the internal processes and links among the system components.

Dunlop conceptualizes the industrial relations system both as a subsystem of society at the national level, as a

19) Dunlop 1958: 30-31.

system of industry-wide collective bargaining, and as a system of work relations in a single enterprise. Although this seems to correspond with common understanding in industrial relations research, it is unclear how this is related to his systems theory approach. Dunlop pays little attention to the relation of these three levels of the industrial relations system. He can therefore be criticized for having acknowledged the scope and the different levels of the industrial relations system only with respect to its external relations but not with respect to the internal structure and processes of the industrial relations system.

Dunlop's approach is an input-output analysis which places high emphasis on contextual factors that influence the structure of the system. Dunlop shows in detail how the content or substance of rules reflects the various contexts of the industrial relations system. The contextual influence varies inversely with the structural complexity of the industrial relations system: "The smaller the unit to which the term (industrial relations system, R.R.) is applied, the larger the context, and in general the larger the influence of givens outside the system" (20). The idea is that workplace rules in a single enterprise are more influenced by technical and market constraints or the distribution of power in society than rules that apply to an industry or a national industrial relations system. The question remains, however, of what constitutes the "core" of an industrial relations system which is not determined by external forces and which integrates both large and small units.

Dunlop's approach to the study of the industrial relations system remains classificatory. He uses various, not always coherent, approaches to discuss or to classify rules and procedures. His main scheme of rules reflects his distinction of "elements" and operates with five "ideal

20) Dunlop 1958: 24.

types" of industrial relations rules and procedures, all linked to the three "actors" and their relationships (21). Rules and procedures are determined for Dunlop by (a) managerial hierarchy; (b) specialized governmental agencies; (c) worker hierarchy; (d) joint management and worker hierarchy; and (e) tripartite rule-making of management, workers and state agencies. In addition he sometimes uses distinctions which are close to legal classifications when he separates administrative regulations, collective agreements and customs and traditions in the work place. In a more descriptive fashion he also distinguishes between compensation rules, disciplinary rules, and job aspiration rules.

Dunlop's analysis of rules and rule-making can be criticized on a number of points. In trying to advance beyond descriptions in his analysis of rules, he merely mentions different sources of rule-making. He does not, however, discriminate between those sources which are internal and those which are external to the industrial relations system. Dunlop can be criticized in general for economic reductionism which is expressed in a tendency to over-generalize that "economic development" is ultimately responsible for rules and rule-making (22).

My main criticism is related to Dunlop's lack of analysis of the actual process of rule-making. Although it is emphasized throughout his study that rule-making creates the centre of the theory of industrial relations, he is ultimately unable to analyze how these rules are created by the system within the limits of his methodology. Schienstock rightly criticizes Dunlop for neglecting decision-making processes and for conceiving actors only as structural entities (23). Dunlop makes no effort to study

21) Dunlop 1958: 13-16; 34-58; 76-77; 92-93; 127; 342-379.

22) "Industrialization proliferates rules". See Dunlop 1958: 343.

23) Schienstock 1982: 40-46 and 55-59.

the actual processes which generate the stable "grid of rules" at the various levels of national industrial relations systems.

It is both astonishing and revealing that Dunlop's theory of industrial relations systematically neglects not only the contribution of collective bargaining and grievance procedures to rule-making but the analysis of collective bargaining as such. There is no separate analysis of the process and structure of collective bargaining and arbitration procedures in his analytical study of industrial relations systems. Grievance procedures are only briefly discussed at a late stage of the analysis where they are conceived solely as mechanisms for the settlement of disputes but not as mechanisms in generating rules (24).

Furthermore, his approach to procedures is half-hearted. Procedures are not important as an independent object of Dunlop's theoretical and comparative study but only insofar as "procedures are themselves rules" (25). Dunlop is preoccupied with the substantive content of rules, which supposedly reveal a higher degree of uniformity in a cross-national comparison of industries than do procedural rules. Unfortunately, he makes no use of his observation that institutional forms of rule application or procedures "particularly well reflect the characteristics of a national industrial relations system" (26). The assumption that "a diversity of procedures may still result in similar

24) Dunlop 1958: 367.

25) Dunlop 1958: 13.

26) Dunlop 1958: 367. In his later studies he showed some interest in the study of collective disputes procedures and dispute-resolution mechanisms for emergency situations in the U.S.. There he found, for example, that state-imposed dispute procedures, and not only rules, can express in their design and structure authoritarian political and legal principles which restrict and govern the autonomy of collective industrial relations. See Dunlop 1984, Part III.

substantive rules" (27) seems to justify an almost complete neglect of the study of procedures in his comparison.

In summary it can be stated that Dunlop's systems theory remains at a classificatory level. This is probably related to the lack of understanding of the theory of structural functionalism which he himself admitted (28). Indeed, his systems-theoretical understanding has hardly exhausted the potential of Parsons' system theory to conceptualize industrial relations systems. Nevertheless, his classificatory approach, which enabled him to present information on foreign industrial relations systems that otherwise might have been suppressed by adopting a strict deductive approach, should probably also be considered a phenomenological virtue without, however, reducing the criticism on his conceptual weaknesses.

Thus it seems hardly acceptable that central areas of industrial relations like collective bargaining, arbitration, grievance handling, negotiations between worker representatives and management, and political exchanges at national level are either neglected or poorly treated in the study. Although rule-making in industrial relations is central in Dunlop's discussion his study reveals a lack of interest in considering the real processes of the creation and application of rules through procedures.

It seems due to Dunlop's rather mechanical understanding of systems theory, which tends to conceptualize industrial relations as a trivial machine, that he underestimates problems related to the internal complexity of the system. More than thirty years after the publication of his study the reader is astonished at the

27) Dunlop 1958: 26.

28) Dunlop thought of his own application of Parsons' system theory that it "may not be acceptable to Professor Parsons, and it may reflect a lack of understanding of his theoretical system". See Dunlop 1958: 30, Footnote 30.

lack of sensitivity to the threats to the system which derive from internal processes. Internal complexity creates problems both for the structure and for the elements of the system. The need to reduce internal complexity is an important reason, for example, for the formalization of interactions between collective actors or between individual and collective actors. However, only recently have we begun to analyze these interactions as communication processes in which the system reproduces itself.

Since the 1950s the theory of social systems has evolved from a closed systems approach to an open systems approach and has most recently been developed into a theory of operationally closed but cognitively open systems. Dunlop applied the former research paradigm to the study of industrial relations. A discussion of the recent "paradigm shift" in systems theory from concerns with structures and functions of social systems to an analysis of the communication processes which are constitutive of the self-reproduction or autopoiesis of the system (29) can help us to advance beyond the Dunlopian approach to a systems theory of industrial relations.

The Theory of Autopoietic Social Systems

The theory of autopoietic social systems has been developed by Niklas Luhmann and his followers during the last two decades. It is widely perceived as an attempt to revolutionize the basic conceptions not only in systems theory of society but in sociology in general. Indeed, Luhmann himself claims to present a new universal sociological theory, a "fachuniversale Theorie" of sociology (30). Thus the autopoietic theory constitutes a challenge

29) Luhmann 1984a: 15-29.

30) Luhmann 1984a: 7-12.

not only to general sociology but to all special sociologies as well, including industrial sociology and the sociological study of industrial relations.

Luhmann, who studied with Talcott Parsons at Harvard University in the early 1960s, initially helped to introduce Parsons' systems theory in West Germany. However, from the outset Luhmann criticized Parsons' structural functionalism for falsely assuming causal relationships between the structure and the function of social systems and analyzing structure and function one-dimensionally with respect to aspects of system maintenance (31).

Luhmann's critique of structural functionalism became more radical when he adopted ideas of autopoietic or self-reproductive systems from general systems theory. Luhmann respecified the theory of autopoietic systems for the study of social systems (32). His theoretical focus shifted from concerns with functions and structure to an analysis of self-reproduction of elements. Since his "autopoietic turn" Luhmann has conceived social systems, contrary to Parsons and Dunlop, as operationally closed and cognitively open systems. The structure and the unity of any system, including developed social systems, is seen as directly dependent on the operationally closed self-reproductive processes.

In the following an attempt is made both to briefly outline and to apply autopoietic systems theory to an analysis of industrial relations (33). The general outline

31) Luhmann 1962.

32) See in particular Luhmann 1984a. The following presentation of the concept of autopoietic social systems will mainly refer to his study of "Soziale Systeme".

33) Luhmann has not applied his theory to industrial relations. Systems theory in general has been criticized by sociologists of neglecting the study of intermediary economic institutions. See Wiswede, Kutsch; Eißler 1987: 6-11, who contrast system theory and utilitarian behaviourism in the sociological study of

of the theory of autopoietic systems proceeds in four steps. First, the concepts of function, differentiation and evolution of society are introduced. Second, the internal complexity and the main system components of a social system, i.e., elements and structures, are discussed. Third, the specific characteristics of a Luhmannian concept of social systems, i.e., communication, self-reference and autopoiesis, are presented. And fourth, the relationships of social systems are reviewed under the headings of interpenetration, structural coupling and interference. In the last section of the chapter the Luhmannian theory will then be applied to analyze the social system of industrial relations.

Functions, Differentiation, and the Evolution of Society

In his analysis of autopoietic systems Luhmann distinguishes between three "levels of analysis": general systems theory, the theory of social systems (as opposed to psychic systems, organisms and machines) and the level of concrete analysis of social systems (34). With respect to the general theory of social systems two types of analysis can be distinguished in studying self-reproduction: analysis in terms of differentiation and analysis in terms of complexity. The first is concerned with the decomposition of social systems into other social systems or subsystems whereas the second is concerned with the decomposition of the system into elements and relations (35). Luhmann combines the two types in his theory of

economics and who prefer the latter. However, there are a number of studies on intermediary associations which explicitly use a systems-theoretical perspective. See Weitbrecht 1969; Teubner 1978; and Prigge 1987a.

34) Luhmann 1990d: 2-3.

35) Luhmann uses the following metaphor to describe the difference between differentiation and complexity analysis: "Im einen Falle geht es um die Zimmer des

social systems. His evolutionary theory of social systems refers mainly to differentiation, whereas his explanation of autopoiesis refers mainly to complexity.

Similar to Parsons, Luhmann considers the development of social systems as a process of differentiation. In his analysis of the development of the social system "society" he deviates only slightly from Parsons' evolutionary levels of primitive, intermediate and modern societies (36) in describing the fact that societies develop from segmentation to stratification to functional differentiation. However, in Luhmann's concept of modern society as primarily a functionally differentiated society, the Parsonian ordering of society with just four primary subsystems is replaced by a polycentric view of society. In Luhmann's theory of modern society there exists neither a fixed number of functionally differentiated social systems nor a firm ranking of functions (37).

"Das impliziert einen Verzicht auf feste Rangordnungen, weil man nicht ein für allemal festlegen kann, daß Politik immer wichtiger ist als Wirtschaft, Wirtschaft immer wichtiger als Recht, Recht immer wichtiger als Wissenschaft, Wissenschaft immer wichtiger als Erziehung, Erziehung immer wichtiger als Gesundheit (und dann vielleicht zirkulär: Gesundheit immer wichtiger als Politik?). An die Stelle einer solchen Rangordnung ... tritt die Regel, daß jedes Funktionssystem der eigenen Funktion den Primat gibt und von diesem Standpunkt aus andere Funktionssysteme, also die Gesellschaft im übrigen, als Umwelt behandelt."

For analytical purposes Luhmann distinguishes between society and functionally differentiated social systems. He considers society as a first order social system, whereas the economic and the legal system are viewed as second order social systems or societal subsystems. Society as a first order social system differs from second order social systems

Hauses, im anderen Falle um die Steine, Balken, Nägel usw.." (Luhmann 1984a: 41).

36) Parsons 1975.

37) See Luhmann 1987c: 34-35,

insofar as it has no other social system as an environment; society's environment consists only of natural and psychic systems.

Differentiation leads not only to several functionally differentiated societal subsystems but continues inside each societal subsystem in the creation of further subsystems. As the system develops through this process of internal differentiation, it itself becomes the environment for its subsystems (38).

The transformation from vertical stratification to horizontal functional differentiation is called the "catastrophe" of modern times (39). However, only society, i.e. the first order social system, is described by Luhmann as losing its centre and becoming polycentral when functional differentiation is adopted as the primary mode of social organization. Luhmann maintains that centralization and stratification remain as structuring principles inside second order social systems where they are used as mechanisms of internal ordering along with decentralization (40). However, this observation of centralization in function systems is not meant by Luhmann as a normative statement but rather as a cynical matter-of-fact statement, which characterizes many of his generally refreshing and illuminating descriptions of societal processes. Indeed, it is not plausible that decentralization should not also be adopted in functional subsystems. Such a general decrease of hierarchy not only in society but also in functional subsystems is described by Willke as a tendency of modern societies (41).

It is made explicit that in an autopoietic systems theory functions are ultimately defined by the social

38) Luhmann 1984a: 258 ff..

39) Luhmann 1987b: 19.

40) Luhmann 1990a: 202-203.

41) Willke 1989: 44-54.

systems themselves. Functions are not derived from universally given pattern variables. Each societal subsystem decides itself in self-referential processes which function it fulfills in society.

Functions of the functionally differentiated societal subsystems are expressed in binary codes which are specific to each functional subsystem of society. Functional social subsystems are guided by these binary codes. Binary codes are achievements of evolution (42). They are necessary requirements to define the boundary of a function system and to select its elements. In applying the binary code the functional subsystems can distinguish between societal communications that belong to the system or the environment of the system. According to Luhmann, examples of binary codes are true/false in case of the science system, right/wrong in case of the legal system and payment/non-payment in case of the economic system (43). However, these codes do not guide the behaviour of the participants directly. They need programs which translate them into behavioural directives (44).

The definition of function is crucial to the theory of a functionally differentiated society. From the outset of his theory construction Luhmann has criticized the use of the concept of function in systems theory (45). Functions are not derived from the system's environment. Luhmann insists that a translation of functions into structures is controlled by the system and not by the environment. This approach avoids the assumption of given functions and structures which limit the study of functions to the aspect of maintenance of structures. It argues instead that the

42) Luhmann 1990d: 233.

43) See on binary codes for the science system Luhmann 1990c, ch. 4, for the legal system Luhmann 1987a and for the economic system Luhmann 1988a: 187-210.

44) Luhmann 1987b: 15.

45) See only Luhmann 1962.

functional method aims at uncovering "functional equivalents" to existing structures.

Luhmann's approach, which was originally labelled "functional structuralism", replaces causal relationships between the system and its environment by the concept of function as goal-orientation ("Zweckorientierung") of the system. However, goals indicate permanent problems of the system, in particular reduction of environmental complexity and stabilization of system boundaries. Thus, the functions as goal-orientations offer no "causal" solutions for the problems of the system. However, this concept of function leads to the insight that functional equivalents to structural solutions (46) usually exist.

The conception of functional equivalence assumes that the system selects structures among functional alternatives. So far, this functional method is mainly used scientifically in analyzing the contingency of system structures. Nevertheless, Luhmann predicts that the functional method will be used increasingly in self-descriptions of the social systems as well. Luhmann also predicts that the realization of previous functional equivalents will cause strain on social systems. The use of the functional method, which thematizes functional equivalents, enables the criticism of previous self-descriptions of the system as simplifications of complex choices between a number of functional equivalents (47).

An "unavoidable consequence of functional differentiation" (48) is that society becomes global. Through the exclusion of fulfilling other functions, the functional subsystems, like science or economy, become able to include all communicative behaviour, unlimited by territorial boundaries. Traditional subsystems which are

46) Luhmann 1968: 260-266.

47) Luhmann 1984a: 83-91.

48) Luhmann 1990d: 178.

constituted by specific communications can spread over the globe. Society as a whole can no longer integrate its subsystems by common territorial frontiers, except for the political system which continues to use frontiers. Indeed, a modern, functionally differentiated society is a world society (49).

Nevertheless, Luhmann distinguishes system integration and social integration. A decrease in territorial system integration is not automatically accompanied by a similar tendency in social integration.

"I carefully avoided any reference to social integration. The concept (of world society, R.R.) does not presuppose any kind of pooled identity or pooled self-esteem (like the nation-state). Modern society in particular is compatible with any degree of inequality of living conditions, as long as this does not interrupt communication." (50)

Unlike Habermas, however, Luhmann sees no solution for systemic problems of modern societies which can be gained from new forms of social integration. Instead, he predicts a decrease in the ability of social integration to integrate systems. Because system integration is less dependent on interaction mechanisms in order to synchronize communications, due to new telecommunications techniques, social integration can independently develop new forms of intimacy than provide solutions for the integration of the world society (51).

49) See the essay on "World Society as a Social System" in Luhmann 1990d: 175-190.

50) Luhmann 1990d: 178-179.

51) Luhmann 1990e: 121-123.

Complexity, Elements and Structure

In addition to the theory of differentiation, the analysis of complexity is the key approach to Luhmann's theoretical construction of social systems. Social systems are conceived as operating in an environment which is necessarily more complex than the system. Luhmann's theory of social differentiation emphasizes that complexity increases not only in the relations between social systems but also within social systems as a result of their operating in a complex environment. Thus complexity is a property of both the system and its environment (52).

The only way in which autopoietic systems can respond to increases in the complexity of their environment is through the creation of internal structures leading to an increase in internal complexity, which then often leads to demands to reduce internal complexity. However, an increase in internal complexity does not mean adaptation to the environment in the sense of Parsons and Dunlop (53).

"Selbstreferentielle autopoietische Systeme sind endogen unruhig und reproduktionsbereit. Sie entwickeln zur Fortsetzung ihrer Autopoiesis eigene Strukturen. Dabei bleibt die Umwelt als Bedingung der Möglichkeit und als Beschränkung vorausgesetzt. Das System wird durch seine Umwelt gehalten und gestört, nicht aber zur Anpassung gezwungen und nicht nur bei bestmöglicher Anpassung zur Reproduktion zugelassen."

The function of structures is not to translate environmental needs into the system. The function of structure is to secure the autonomy of the system's self-reproduction, which is conceived as an operationally closed process. Although the environment remains both a necessary condition and a constant constraint and irritating factor

52) Luhmann 1984a: 261-262.

53) Luhmann 1990a: 36.

for the system, it cannot force the system to adapt its reproduction.

Luhmann develops a definition of system complexity at the level of elements and their relations. In the abstract, system complexity is defined as the relationship between the set of all possible relations between elements (contingency) and the selectivity achieved by the self-constituted structure of a system (54). This definition combines the problems of the selectivity, contingency and self-constitution of the system through specific selections (55).

Systems of higher order can determine the number and the unity of elements for themselves. The social systems of higher order can have less internal complexity than systems of lower order. Elements are the units which are non-decomposable for the system. Elements are related to each other; without relation there exists no element (56). Elements are highly complex and are constituted by the social system. Furthermore, the unity of an element is constituted by the system through ascription ("Zurechnung") (57). Thus elements do not exist as such but only for the system and through the system.

Luhmann offers in this respect an alternative to Dunlop's classificatory approach to the definition of the elements of a system. Dunlop was unable to find a unifying characteristic of his elements because he avoided analyzing elements as defined by the industrial relations system itself. In Dunlop's input-output approach elements are created by adoption processes to its contexts. In Luhmann's approach elements are constituted by the system itself and they derive their meaning from the industrial relations system and not from the environment of the system.

54) See Luhmann 1984a: 46-50.

55) See also Willke 1987: 17.

56) Luhmann 1984a: 41.

57) Luhmann 1984a: 44.

An increase in the number of internally complex elements reaches a threshold for Luhmann beyond which it is no longer possible to combine all elements with each other. As the system cannot further decompose the elements, certain relations of elements must be selected to create a system. Thus a system reduces complexity by selecting certain relationships and not by selecting certain elements. However, the selection of certain relationships of elements also increases complexity within the system as well. Thus the social system is confronted with the paradoxical situation that reduction of complexity leads to an increase in complexity.

Structures of the system emerge both from self-reproduction of the elements and from selection of relationships. In Parsons' and Dunlop's systems theory approach the social system as a whole is conceived as an aggregation of its parts. Luhmann replaces this hierarchical view by a circular view. The system acquires properties ("emergente Eigenschaften") in the evolutionary process which cannot be explained by the properties of its elements (58). The system uses the self-reproduction of the elements for its own self-reproduction, upon which in turn the self-reproduction of the elements becomes dependent. The structure of the system evolves in this process as a product of both the self-reproduction of the elements and the system itself.

Autopoietic systems theory develops a new understanding of structure. Luhmann insists that it is not sufficient to define structure as relations of elements. In the general autopoietic conception of systems, structures result from the fact that only certain relations of elements are selected and held constant over time. Structure is thus

58) See also Willke 1987: 100.

defined as limitation of possible combinations of elements within the system (59).

Structures of social systems are not formed by action or institutions. Instead, they are derived from expectations of behaviour. Expectations both limit possible combinations of elements and create new possibilities for combinations. There exists no other mechanism of creation of structures for social systems than that of generalization of expectations and of forming reflexive expectations, i.e. expectations of expectations (60).

Expectations are defined as "symbolic generalizations of meaning" (61). Meaning, for Luhmann, is the over-arching category which characterizes both psychic and social systems. Meaning is "described" by him with reference to three dimensions: temporal, material, and social. In all three dimensions expectations can be generalized: In the social dimension the process of generalization of expectations leads to institutionalization. However, to stabilize expectations beyond factual situations it is necessary to establish contrafactual expectations. Thus in the time dimension, expectations are generalized through norms which enforce certain expectations in case of their rejection in concrete situations. Norms are thus characterized as counterfactual and "disappointment-proof" (62). And in the material dimension expectations are generalized or bundled as persons, roles, programs and values (63). Luhmann's social theory of law is based on the conception of congruence of generalization and stabilization of counterfactual, normative behavioural expectations in the temporal, material and social dimension (64).

59) Luhmann 1984a: 73-74; 382-87.

60) Luhmann 1984a: 139-140 and 411-421.

61) Luhmann 1984a: 139.

62) Luhmann 1985a: 73

63) Luhmann 1984a: 421-456.

64) Luhmann 1985a: 73-83.

Luhmann postulates that operation of meaning is the only form of operation for psychic and social systems to "digest" complexity and self-reference. Unfortunately he fails to define meaning, and resorts instead to a "phenomenological description" of meaning (65). Of course, the distinction of the three dimensions of meaning is highly suggestive and useful, but the vagueness and the unresolved linguistic and philosophical connotations of the concept of meaning can still be criticized, as Habermas did prior to Luhmann's autopoietic turn (66). Luhmann's concept of meaning and, indeed, his theoretical background in general, comprise and are influenced by rather heterogeneous philosophical traditions, among others Husserl's phenomenology, Günther's and Spencer Brown's logics, post-Kantian cognitive sciences, Whitehead's cosmology and epistemology and, of course, Maturana's and Varela's autopoietic theory and von Foerster's systems theory (67). It might be questioned whether these traditions are compatible or whether they remain eclectic points of reference, only reflecting Luhmann's personal philosophical tastes. However, this shall only be stated as an irritating factor which might or might not have an influence on the theory construction (68). This cannot be discussed within the limits of the present study.

65) "Was Sinn ist ..., läßt sich am besten in der Form einer phänomenologischen Beschreibung vorführen." Luhmann 1984a: 93.

66) Habermas in: Habermas and Luhmann 1971: 171-202.

67) See, for example, Luhmann 1984a, ch. 2 on the phenomenology of meaning, pp. 377-382 and 394-396 on structuralism and on Whitehead's cosmology, and ch. 12 on post-Kantian epistemology. See also Luhmann 1990d: 21-85.

68) See also Habermas 1985a: 426-445.

Communication, Self-Reference and Autopoiesis

Probably the most radical departure from the Parsonian theory of the social system and, indeed, from conventional sociology, is Luhmann's assumption that the ultimate, non-decomposable elements of an autopoietic social system are communications and not human beings. Human beings belong to the environment of the social system; their individuality and their consciousness are treated as highly complex psychic systems (69). Accordingly, if industrial relations are analyzed based on Luhmann's theory of social systems, its "elements" have to be defined as communications.

Communication consists of three components in Luhmann's account: information, utterance and understanding. Each component is described as a selection, and communication is characterized as the coordination of three selections (70). Each communication is embedded in a recursive process of communications. Thus without linkage to other communications no communication can happen.

Communications cannot be observed. This is tragic for a social system because its survival depends on its ability to observe and describe itself which are preconditions for self-reference and autopoiesis. Thus a communication system has to ascribe itself as an action system to become observable both for external observers and for self-observation (71).

Luhmann defines action in the tradition of systems theory as a selection ascribed to systems ("Handlung ist auf Systeme zugerechnete Selektion" (72)). He derives his theory of action as selection from Parsons' theory of double

69) See only Luhmann 1984a, ch. 7.

70) Luhmann 1984a: 195-196.

71) Luhmann 1984a: 226.

72) Luhmann 1984a: 160.

contingency. The concept of action was based on a concept of interaction in Parsons' "The Social System". Social interaction in this second phase of Parsons' theory building was described as a situation of double contingency in which two actors choose voluntarily between sets of alternatives under conditions of "evaluative orientation". Social action is seen as a product of interaction because actors' choices are guided by "patterns of value orientation" which structure the interaction situation (73).

Luhmann reinterprets Parsons' concept of double contingency. To analyze action systems it is not necessary, according to Luhmann, to refer to the motivations of the actors which orientate their behaviour towards cultural patterns and symbolic values. He emphasizes instead that the formal characteristics of double contingency lead to structures in the interaction situation. Structure reduces uncertainty and creates trust relations (74). In a doubly contingent situation each participant assumes uncertainty similar to his own uncertainty about the behaviour of the other participant. Thus his behaviour is orientated both towards his own and towards the projected uncertainty of the other participant. In addition, he perceives that the uncertainty of the other participant is dependent on his own uncertainty (75). In this sense the mutuality of expectations creates the structure of the interaction system. The interaction system binds the two actors through double contingency and thus becomes a self-referential circle. Luhmann merges the theory of self-reference and double contingency and thus arrives at a concept of action without subject (76).

Luhmann reverses the common sociological view of social systems as constituted by action. Instead, the autopoietic

73) Parsons 1951: 37.

74) Luhmann 1984a: 179-182.

75) Luhmann 1984a: 166.

76) Luhmann 1984a: 164.

system, based on self-reference, selects and ascribes certain communications as actions. Behaviour becomes action only if it is constituted as an element of a social system. However, to become able to ascribe communications as actions, the interaction must have advanced beyond elementary self-reference. The elementary form of self-reference, i.e., referring to ego by referring to alter, is not sufficient to define action as an element of the system. In fact, the system of interaction must have been established in a second self-referential circle to become able to define action as an element of the system (77).

Thus the situation of double contingency of two actors implies two self-referential circles: Action realizes its own operation, i.e., creation of meaning, and its realization automatically becomes a demonstration of its existence within the social situation of alter and ego and thus initiates social self-reference (78).

Interaction systems which are structured by the proposition: "I do what you want if you do what I want" are unstable. Such a self-referential circle can cease to exist from one moment to the next; to survive, it needs the system which treats the self-referential circle as a basic element of its self-reproduction (79). Self-reference of the system means, in this respect, that the system produces and delimits the operative unity of its elements through the operation of its elements. It is precisely this process that Luhmann calls the autopoietic process, which lends its own unity to the system (80).

Self-reference is an operation which involves applying a distinction to indicate something to which the operation of reference itself belongs. Luhmann distinguishes between

77) Luhmann 1984a: 184.

78) Luhmann 1984a: 183.

79) Luhmann 1984a: 183.

80) Luhmann 1985: 281-282; see also Luhmann 1984a: 57-65.

three forms of self-reference (81): (1) Basic self-reference: an element relates to itself by means of the distinction between element and relation without being system-reference. (2) Process-oriented self-reference or reflexivity: when elements are arranged into processes, as is usually the case with communications, self-reference means relation of processes through the application of the distinction between before and after. (3) Self-reference as system-reference or reflexion: the system refers to itself; self-reference of systems means that not only the elements or the processes but also the system as such refers to itself.

A self-reproductive communication system can never be autarkical or self-sufficient. It needs energy and information from its environment. In addition its communication of meaning relates directly or indirectly to the environment. A communication system is only autonomous in the sense that it controls the synthesis of communications (82). Otherwise it is open to the environment and in particular to societal communications. With respect to the legal system, Luhmann has demonstrated this openness as cognitive openness which is paradoxically linked to the normative closure of the legal operations (83).

Pre-autopoietic systems theory defined systems as open systems which are characterized by their exchange relations with the environment. Autopoietic systems theory conceives systems instead as closed systems which reproduce themselves not by variation of structure but by constant recombination of their elements. Recursive closedness of the system, with respect to its elements, guarantees self-reproduction or autopoiesis. Luhmann constructs a theory of an operationally closed social system which is not dependent on

81) Luhmann 1984a: 599-602.

82) Luhmann 1984a: 200.

83) Luhmann 1990d: 229-234 and Luhmann 1985a: 31-40.

other social systems or its environment for its core activity, i.e. autopoiesis. Only if autopoiesis is guaranteed, can the system be open and relate to the innumerable events and conditions of its environment.

Interpenetration, Structural Coupling and Interference

A particular pertinent problem for a theory of autopoietic social systems that remains is the precise conceptualization of the relationship of the system to its environment. If self-reproduction is the ultimate concern, the vital operations must occur within the system and can neither be located in the environment nor in the exchange relations between the system and the environment. Autopoietic operations cannot directly link with processes in the environment. Systems only observe each other but do not regulate each other. External regulation of self-reproduction can only be successful if it corresponds with self-regulation. The "disenchanted" state is limited in this conception to societal steering which realizes self-regulation as the prevalent mode of regulation (84).

A social system can logically develop three kinds of relationships. It can relate to society, it can relate to another social system or societal subsystem, and it can relate to itself. Luhmann has proposed calling the relationship to society function, to another social subsystem performance (Leistung), and to itself, as was already mentioned in the discussion of the self-referential nature of social systems, reflexion (85).

In an autopoietic system all external references are guided by internal processes. External references become

84) Willke: 1983a.

85) See, for example, Luhmann 1990c: 635-648.

meaningful for the system only by internal operations. The legal system, for example, internally attaches meaning to external references by distinguishing norms and facts, and this distinction and the subsequent combination of norms and facts are guided by internal legal criteria (86). This constitutes the basis of operational closure of the legal system.

The forms of relationships of the system, based on this operational closure, are called the openness of the system. Relationships can occur on the level of elements and on the level of structure. On the level of elements, the system can relate to any form of societal communication and can incorporate it by applying the binary code of the system. Because Luhmann distinguishes between structure based on communication and structure based on action (87), the relations of system structures become complex. Luhmann himself has advanced the theory of intersystemic relations mainly on the level of structures based on action. A number of competing approaches which conceptualize relations of action systems are discussed in systems theory . Three concepts in analyzing intersystemic relationships can be distinguished: interpenetration, structural coupling and interference.

(a) Interpenetration

There are several attempts in the theory of social systems to analyze intersystemic relations by applying the concept of interpenetration, originally introduced by Talcott Parsons. He developed the concept of interpenetration in the vein of his systems theoretical turn to the AGIL scheme.

86) Teubner 1989: 97-98.

87) Luhmann 1984a: 382.

Parsons' concept of interpenetration aims at the overlapping of systems in general. His main interest lies in studying the effects of intersystemic relations on action systems (88). He describes interpenetration as the process of incorporation of cultural values in social subsystems. Interpenetration is the abstract term which represents the three processes of institutionalization, internalization, and learning. The process of interpenetration is a process of embedding the cultural value patterns into action or interaction systems (89). Interpenetration replaces the role concept in analyzing internalization of cultural values.

Some authors have used the Parsonian concept of interpenetration for a general theory of intersystemic relations (90). Richard Münch, for example, proposes generalizing the concept of interpenetration to encompass those interactions between society and environment in which "these two transform each other at the margin, without mutually changing their central cores" (91). Interpenetration of interaction of society and environment generates societal subsystems which then interpenetrate each other. In Münch's conception, differentiation occurs as a result of interpenetration (92). It becomes the key concept in "understanding modernity" (93). However, Münch's approach is too diffuse and too simplistic to be useful (94). From the perspective of autopoietic systems theory, the crucial question of operational closure and its impact on interpenetration is missing in Münch's analysis.

88) Parsons 1971: 5-6.

89) See the discussion of Parsons' concept of interpenetration in Jensen 1978, Luhmann 1978b and Luhmann 1981c: 152.

90) See Jensen 1978, Münch 1987 and Münch 1988.

91) Münch 1987: 67.

92) Münch 1988: 224.

93) Münch 1988: 222-250.

94) See also Teubner 1989: 110.

Luhmann offers in this respect a more convincing interpretation of the interpenetration conception. He restricts the concept of interpenetration to relations of human beings and social systems. With reference to Parsons' late work (95), Luhmann reinterprets interpenetration. It is translated (96) into a conception for an analysis of the relation of social systems and human beings or psychic system, i.e., consciousness. Luhmann describes interpenetration as process of mutual contribution to the selective constitution of elements of the social and the psychic system. The two systems interpenetrate each other through adoption of complexity and boundaries (97). Thus, the key feature of the concept of interpenetration is the transmission or use of complexity between the psychic and the social system for the creation of internal orders and structures.

However, the exchange of complexity is not restricted to the relation of psychic and social systems. It might be useful for further discussion of the autopoietic social theory to reserve the concept of interpenetration for the description of general processes of exchange of complexity between systems. Nevertheless, for our purposes of a theory of autopoietic industrial relations we shall follow Luhmann and restrict the concept of interpenetration to the relationships of the psychic and the social systems.

(b) Structural Coupling

The external relations of social systems are analyzed by Luhmann mainly by applying the concept of structural coupling of social systems. Luhmann has adopted this concept from general systems theory. However, the concept of structural coupling was originally invented in biology to

95) Parsons 1978.

96) See Luhmann 1978b: 300.

97) Luhmann 1984a, ch. 6.

explain the link of cells and metacellular living systems to their environment and to other living systems.

Maturana and Varela applied the conception of structural coupling to analyze the ontogenesis of autopoietic living systems in their biological theory of cognition (98). They argue that the recursive coupling of the structures of different autopoietic units leads to a history of reciprocal structural changes as responses to mutual perturbations. Structural coupling of cells, for example, leads to metacellular units which develop into second order units and then become autopoietic systems themselves (99).

Maturana and Varela apply the concept of structural coupling to the analysis of human cognition. The structural coupling of autopoietic units can solve the problem of human knowledge and perception of the biological and cultural mechanisms of social life. Human life develops cognitive "blind spots" which disguise the mechanisms of its creation. Human knowledge limits itself: "We do not see what we do not see, and what we do not see does not exist" (100). The understanding of structural coupling of autopoietic units is the solution to the problem that there exists no independent position for the observation and description of the development of human life and the world at large. Structural coupling can be understood as the source of irritations of the systems. Only in exceptional circumstances are the systems irritated by new factors which occur in these established structural relations. However, these irritations lead to new knowledge according to Maturana and Varela and, indeed, to the evolution of mankind.

98) Maturana and Varela 1987: 85-89.

99) Maturana and Varela 1987: 98-100.

100) Maturana and Varela 1987: 260; see also Maturana and Varela 1980: 38-40.

Nevertheless, perturbations cannot cause changes in an autopoietic system. They can only irritate the system and thus initiate internally controlled operations in operationally closed systems. Thus, structural coupling of the system and the environment does not contribute operations or any other components to the reproduction of the systems. It is simply the specific form in which the system presupposes specific states or changes in its environment and relies on them.

Structural coupling of autopoietic systems should not be confused with causal relations. The exchange of information between autopoietic systems cannot be described in terms of input and output. In fact the theory of autopoietic systems replaces the input-output model with the concept of structural coupling. Causality is conceived only as a construct of an observer who is interested in causal attributions. Intersystemic relations are highly selective connections between systems and their environments. Events in the environment of the system can only influence the chances of structural variation of systems but cannot determine structural changes.

Willke has put forward an interesting combination of the concepts of structural coupling autopoiesis and autonomy. Whereas the concept of autopoiesis is restricted to the internal horizon of systems, the concept of autonomy encompasses both the internal and the external horizons of the systems. The analysis of the autonomy of systems includes both the self-reference and the external reference of the system (101).

In Luhmann's theory of a modern society as a combination of autopoietic social systems without centre, structural coupling becomes the concept to describe the combination. In accordance with Maturana and Varela,

101) Willke 1989: 48.

structural coupling for Luhmann means reciprocal irritation or perturbation of the structures of the coupled systems. Structural responses are limited by reproductive processes of the elements of the system. Thus each system can respond to the irritation only with internal means which are dependent on the autopoiesis of the system. Luhmann compares the perturbation relation of social systems to that of colliding billiard balls which continue to move in different directions after the collision (102).

Structural coupling means a relation of social systems which is compatible with functional differentiation of autopoietic social systems. Structural coupling can neither overcome the identity and autonomy of the coupled systems nor rank functional sub-systems in an asymmetrical hierarchical fashion. Structural coupling allows only selective exchanges between the systems. Structural coupling produces irritations inside the system which are implemented by the system through its network of operations into further operations (103).

The concept of structural coupling tries to explain, for example, how the political system uses law to solve problems of self-reference and, vice versa, how the legal system uses politics to solve its problems with self-reference. The concept of structural coupling argues that this instrumentalization is only possible because systems do not overlap. The separation of functional subsystems is a precondition for selective structural coupling.

The conception of structural coupling has been further developed by Luhmann in his recent studies of the legal, the economic and the science systems (104). Luhmann discusses the semantic concepts of constitution, contract and property as mechanisms of structural coupling between social systems.

102) Luhmann 1990b: 204..

103) Luhmann 1990e: 103.

104) Luhmann 1988a, 1989, 1990b and 1990c.

The constitution couples the political and the legal system, contract and property couple the economic and the legal system.

Luhmann has demonstrated the process of separation and recombination of social systems with respect to the function of the constitution in the legal and in the political system in some detail. The semantic concept of the constitution which was developed in the eighteenth century recombines the functionally differentiated political and legal system. According to Luhmann the main reason for constitutions were not independence from colonial domination, as in the case of the U.S., nor the formation of political sovereignty in a revolutionary situation, as in the French case, but the occurrence of problems of self-reference, paradoxes and asymmetries in the legal and in the political systems of the respective countries.

The two main problems of the functionally differentiated systems are then that the law had to realize that law is whatever the law arranges to be legal or illegal and that the political system had to solve the problem of sovereign power which was bound by itself. The concept of the constitution offers the solution for both systems because it separates the political and the legal systems and provides for their structural coupling. The paradoxes of both systems can be unfolded, on the one side, by reference of the legal system to the political system, e.g. the political will of the people giving itself a constitution, and on the other side, by reference of the political system to the positive law and by "super-coding" the legal system with the distinction between constitutional and unconstitutional legality.

Luhmann has adopted another biological metaphor, in addition to structural coupling, to conceptualize relations of society and social systems. Luhmann uses the idea of medium or materiality continuum. Society is the materiality

continuum of functional systems; societal structures, in particular language, are mediated into the legal system through this materiality continuum (105).

(c) Interference

Teubner has criticized Luhmann's approach to intersystemic relations which uses the materiality continuum as contradictory and as inconsistent with his general theory of society. Teubner criticizes that this concept of structural coupling in a materiality continuum cannot adequately explain the "mediation" of societal structures and functional sub-systems (106). It confuses societal and extra-societal links of the social system. The links of social systems between each other need different concepts from the links of the social systems to their material environment.

For Teubner, direct contact of social systems is possible within society. He proposes to conceptualize the relation of social systems as interference (107). Whereas Luhmann uses the biological metaphors of structural coupling and materiality continuum, Teubner resorts to physics, or, to be precise, to optics, in proposing interference as the concept to describe intersystemic links. Interference is thus suggested as a concept to describe the direct contacts between social systems and their societal environment.

Interference is possible because of the special nature of the element of a functional social system. This element is communication, which is always at the same time general societal and special communication in the functional system. The elements of functional systems consist of the same substance as in society at large. Indeed, the same communication is linked to the communication process or

105) Luhmann 1988c.

106) Teubner 1989: 105-109.

107) Teubner 1989: 106.

circle of society and of the functional system. Teubner calls this societal context of communication the "life world context". Thus interference and structural coupling or materiality continuum differ insofar as the elements of social subsystems or of functional subsystems are derived from societal communication and thus are not closed towards each other. Teubner sees social systems linked not only at the structural level but also with respect to elements.

It might be questioned if Teubner's critique of Luhmann still applies to Luhmann's recent attempts to make use of the concepts of structural coupling and materiality continuum. In these writings Luhmann separates the concept of structural coupling and the discussion of the materiality continuum (108). Nevertheless, Teubner's conceptual distinction between intersystemic relations of social systems and of relations of social systems and their physical and psychic environments is convincing.

Teubner's concept of interference can serve as a heuristic guideline for our discussion of the industrial relations system, the political system and the legal system. He distinguishes three types of interference: interference of events, interference of structures, interference of roles.

- Interference of events means the simultaneous presence of events in different systems. Communications are events which have the potential to be recognized in different system contexts at the same time . They allow punctual links between systems.
- Interference of structures is related to expectations. General societal expectations and expectations related to a partial functional subsystem can overlap. General

108) Luhmann 1990a: 41 on coupling and resonance and especially 1990c, ch. 1 on consciousness and communication.

social constructions of reality can be used in functional subsystems for their construction of reality.

- Interference of roles is related to overlapping membership in different systems. Double membership is a mechanism for solving intersystemic conflicts (109).

Hutter has used the theory of interference of social systems in his case study on the "Production of Law". He has further developed the concept of interference by introducing the idea of conversation circles in which social systems can interfere. Interference is responsible for new "utterances" (Mitteilungen) in conversations which lead to change in the social system (110).

Hutter (111) and Luhmann (112) have both proposed using a general theory of therapy to analyze intersystemic relations. A system influences another system through involvement in a conversation which allows transfer of knowledge without destroying the autonomy of the recipient of knowledge. The recipient of therapeutic suggestions remains free to choose according to his own autopoietic needs.

The remark on a general conception of therapy leads to a final observation in our description of the autopoietic conception of social systems. The autopoietic theory has far-reaching epistemological consequences for external observation and scientific analysis. Self-observation and external observation are both self-referentially structured. All observations and descriptions are thus "system relative". Explanations refer to reasons; these reasons, however, can only be justified by reference to other reasons and reasoning is thus a self-referential process. If

109) Teubner 1989: 111.

110) Hutter 1989: 43.

111) Hutter 1989: 129.

112) Luhmann 1990c: 648-653.

"ultimate reasons" ("Letztbegründung") are sought, they can only be found in self-referential theories of self-referential systems (113). External explanation cannot claim to be outside systems; it is always linked to its own system, in this case the scientific system, and is thus "system-relative".

The Social System of Industrial Relations

In the following, the Luhmannian concept of a social system is applied to industrial relations in two steps. First, five types of social systems, which can be derived from Luhmann's approach, are discussed as possible candidates to characterize the industrial relations system as a social system. Second, a proposal to define industrial relations as a social system is presented on the basis of the previous descriptions of the Luhmannian concept of a social system.

Five Types of Social Systems

Luhmann's general theory of social systems distinguishes three levels of analysis of social systems: interaction, organization and society (114). Accordingly, we can derive three types of social systems: interaction systems, organization systems, and function systems of society. Two additional types can be found in Luhmann's analysis of social systems which are characterized by operating with contradicting communication relations either

113) See Luhmann 1984a: 654-661. A self-referential theory of law is discussed in Teubner 1990b.

114) Luhmann 1984a: 15-18.

to another social system or to the society at large. These are called conflict system and immune system accordingly.

Thus Luhmann's theory offers five types of social systems as possible candidates to characterize industrial relations as a social system. On the basis of the distinction of the five types of social systems, I shall discuss in the following how industrial relations can be described (a) as a set of interaction systems, (b) as a hypercyclically constituted network of organizations, (c) as a conflict system, (d) as an immune system of society, and (e) as a functionally differentiated societal subsystem.

(a) Industrial relations as a set of interaction systems

Luhmann describes interaction systems as "simple" social systems which are formally characterized as communication between participants who are present (115). The presence of the participants is established through their mutual perception. Communication among present participants consists of both verbal and non-verbal communication. The perception of non-verbal communication among present actors is always reflexive perception because ego's perception can be perceived by alter and vice versa (116). However, verbal communication is superior to non-verbal communication in "simple" social systems because it can be guided by topics. Topics represent rudimentary structures of the system. The structure of interaction systems is created through the autopoietic requirement of continuous communication. Mechanisms of the creation of structure are: sequential order of relevant events; communication is structured by topics; and participants are not allowed to talk all at once, but only one after the other (117).

115) Luhmann 1975: 21-38.

116) Luhmann 1975: 23-24.

117) Luhmann 1984a: 564.

Structures of interaction systems are not very stable because topics, for example, can be changed easily. Structurally interaction systems show a low degree of autonomy. Interactions are episodes with a strong tendency to disappear when the communication among present actors ends. To become interaction systems, episodes must be combined (118). In addition, interactions must be able to reproduce themselves through self-constituting self-reference.

Luhmann insists that interaction systems and society are dependent on each other by definition, but that society as a social system cannot be reduced to interaction systems (119). However, many questions remain open as to which way interaction systems are linked both to each other and to society. Their relationship with organizations is even less adequately clarified in Luhmann's theory.

Nevertheless, the application of the analysis of interaction systems to industrial relations is obvious. Negotiations are systems in which actors are present. The communication in collective bargaining negotiations, for example, is structured by an agenda, by topics and by a procedure which prescribes formal rules of participation in communications. These negotiations are episodes which are linked through their results, i.e. collective bargaining agreements, which are supposed to be renegotiated after a certain period of time.

Interaction systems of the industrial relations system have generally achieved a high degree of structural autonomy. Collective bargaining and grievance procedures both define which claim or grievance they can process in procedures which are established by the systems themselves. These negotiation systems define their communicative

118) Luhmann 1984a: 553.

119) Luhmann 1984a, ch. 10.

elements through self-reference and are therefore autopoietic systems.

The industrial relations literature provides many descriptions of the autonomous character of collective bargaining which allude to self-reproductive concerns of the industrial relations system. Wolfgang-Ulrich Prigge, for example, defines collective bargaining as a negotiation system of interorganizational self-governance which is able to determine topics of discussion, processes or phases of negotiations and the roles of the negotiators (120).

Industrial relations communications are not only the result of interactions but they also describe themselves as industrial relations negotiations. Furthermore, collective bargaining negotiations can link together because they can recognize each other as similar interaction systems. They form a set of independent interaction systems.

If industrial relations are viewed as a set or combination of interaction systems, it might be asked if the set itself has evolved into a new kind of system through the combination of interaction systems. The set might have achieved the capacity to define the various interaction systems as its elements. In this case negotiations in industrial relations interaction systems are no longer randomly related communicative episodes. These interaction systems might be linked through their communications. Several other system components of interaction systems might be related according to a higher, or second, order which has evolved at the level of industrial relations at large. In this case it would be insufficient to describe industrial relations only in terms of a set of loosely related interaction systems.

120) Prigge 1987 33-5. Prigge's approach is an open systems approach. The analysis of institutional structures dominates over the analysis of communicative processes in this input-output analysis.

(b) Industrial relations as a hypercyclically constituted network of organizations

Organization theory is a candidate in analyzing the set of interaction systems as a second order system. The organizational account of industrial relations usually focuses on the special characteristics of interactions in industrial relations which are often carried out by organizations of employers and employees. However, organization theory can be applied at two levels: at the level of participants of industrial relations interactions and at the level of the industrial relations system at large.

Industrial relations interactions are special insofar as they are not based on communications between individuals but between collective actors. Collective bargaining on a meso-level of industry or region and on a micro-level in the company or the plant is carried out by unions or worker representatives and employer associations or employer representatives. These collective actors are either organizations or groups of representatives.

The topics of industrial relations communications are the result of organizational processes. Claims in collective bargaining are agreed upon in internal processes of unions or employer associations. Grievances are shaped in communications between the grievant and the union representative, the works council or the shop steward. The initial proposals in industrial relations negotiations are often controlled and confined by organizations which are only indirectly present in the negotiations. Collective bargaining proposals are products of intra-organizational consensus.

However, it cannot be overlooked that these intra-organizational processes are not autonomous but linked to the negotiation processes between their organization and

other organizations and thus are dependent on extra-organizational processes. An interesting research question in this respect is the study of the extent to which the intra-organizational processes reflect the conditions of negotiations in the particular collective bargaining system of the company, the region, or the country. There seems to be evidence that the independence of the collective actors from the collective bargaining system decreases with the development of the industrial negotiation systems. Hansjörg Weitbrecht, who studied the generation of collective bargaining claims of the German metal workers union, found that the relation between the size of the claim and the outcome of bargaining remained remarkably stable (121). This finding can be interpreted from a system theoretic point of view to indicate both the separate existence and the links between the claims-generating organizations and the negotiation system. The organizations which are responsible for the claims recognize the separate existence of the negotiation system by referring to experiences with claims in previous negotiations. Unions and employers define their roles by referring to the negotiation system and to its conditions which thus influences the generation of claims.

Therefore, it becomes necessary to ask about the nature of the negotiation system. It could be an autopoietic system itself. A possible approach to study the nature of the negotiation system is to apply Teubner's concept of the gradual development of autopoietic systems to the analysis of the collective bargaining system.

Teubner has demonstrated the gradual concept with respect to the evolution of an autopoietic organization. He proposes to link interaction and organization as cumulation of self-reference. He distinguishes between interaction,

121) Weitbrecht 1969: 145. He reports that the outcome of negotiations in the German metal industry remained at a level of two-third of the union claim from 1948 to 1966.

group and organization (122). Whereas interaction is defined by the presence of participants, a group is formed when the presence of a participant is used as a criterion for self-description of the interaction, i.e., participants in interaction become members. If membership is used to define the boundary of the system, this allows repetition of the interaction despite the absence of the participants, and thus creates an autonomous action system. Organizations are characterized by hypercyclical relations of elements, boundary, structure and identity. Organizations become collective actors when self-referentially constituted system components, i.e. organizational norms, actors, membership, and identity are hypercyclically combined. The collective actor is constituted through a cyclical relation of organizational decisions and organizational identity. Organizations therefore are called second order autopoietic systems.

However, a certain uneasiness in viewing the industrial relations system simply as an organization system remains. Most industrial relations systems are certainly capable of communicating their internally achieved results to the external world (123). They define themselves through membership by inclusion of certain collective actors and by exclusion of others. And they can isolate themselves from social and psychic conditions in order to follow self-generated programs (124).

Nevertheless, there is something specific about industrial relations which is not captured by this description. This is related to the fact that the main instrument for self-regulation and the creation of internal structures is a mutual agreement. In this respect another theoretical suggestion of Gunther Teubner can be discussed.

122) Teubner 1987: 113-121.

123) Luhmann 1990c: 672.

124) See Luhmann 1988.

Teubner has recently proposed separating types of social systems at the intermediate level between interaction and society where Luhmann locates organizations. Teubner suggests viewing "contract" as a social institution next to organization, which is characterized by "formalization of exchange" whereas organization is seen as "formalization of cooperation" (125).

In applying his theory of the hypercycle Teubner demonstrates that contracts can evolve into autopoietic social systems. Through self-reference the contract becomes an autonomous social system which is able to define certain communications as "contractual acts" and which can create a structure of "contractual norms". In further self-referential processes, when contract norms and acts lead to contractual norm production, Teubner sees basic hypercycles at work (126).

Furthermore, when contract and organization are combined, networks "emerge". They are said to be autopoietic systems of a higher order "insofern sie durch Doppelattribution emergente Elementarakte ("Netzwerkkooperationen") herausbilden und diese zirkulär zu einem Operationssystem verknüpfen" (127). Networks are collective actors which act through other collective actors. They are systems which are formed through a combination of contract and organizations and which possess the major features of an autopoietic system.

In applying Teubner's idea of a hypercyclically constituted network, it can be argued that collective bargaining develops into an autonomous network system between organizations which becomes able to define both its

125) Teubner 1990.

126) Teubner 1990: 10-11.

127) Teubner 1990: 15. For Teubner, examples of legal recognition of such networks are the legal regulation of company law "hybrids" such as franchising systems and joint ventures.

norms and the status of its members, i.e., the participating collective actors. Collective bargaining creates mechanisms of self-observation and self-constitution. It is able to produce its own norms, rules and institutional structures.

Furthermore, the collective bargaining system hypercyclically relates its system components and thus creates elementary acts in the form of negotiations which are recursively related. The collective bargaining system is able to define unions as actors in collective bargaining and thus is a collective actor which acts through other collective actors. Thus interactions of unions and employer associations form a network which produces norms, defines a space and forms a unity.

The collective bargaining and other negotiation systems between the industrial partners form autopoietic systems which are of a different quality than in interaction systems. However, the main problem with this analysis of industrial relations as a network or several networks lies in the theoretical concept of the relation of the industrial relations system to other functional subsystems of society and to the society at large.

(c) Industrial relations as a conflict system

With respect to intersystemic links Luhmann's theory of social systems offers a further possibility of conceptualizing the industrial relations system as a social system, i.e., the conflict system which has developed within another social system (128). For Luhmann, a conflict system is characterized by four aspects: contradiction, conflict, negative double contingency, parasitic position inside social systems. Contradiction is defined as non-acceptance of a communication or, in other words, a situation in which expectations are not fulfilled.

128) Luhmann 1984a: 529-541.

Social systems create contradictions through communication of negation. Thus contradictions form part of the self-reference of social systems. Contradictions are constituted by the social system through the unity of the three elements of communication: information, utterance and understanding.

"Erst die Einheitsvermutung der Kommunikation konstituiert durch die Auswahl dessen, was sie zusammenzieht, den Widerspruch. Der Widerspruch entsteht dadurch, daß er kommuniziert wird." (129)

There are two forms of contradictions according to Luhmann: contradiction of another communication or contradiction of own communication, i.e. self-contradiction. A well known form of self-contradiction is irony, in which the form of presentation contradicts the content of the communication.

A contradiction only becomes a conflict when the contradiction is voiced and the refusal of expectations is communicated back as negation of the communication. Luhmann has described the possibility of a conflict system, based on recursively communicated negations, which becomes an independent social system of a particular kind (130). In interactional conflict systems, the situation of double contingency is redefined as one of "negative" double contingency in which ego refuses to do what alter wishes since ego expects alter not to do what ego wants. In itself, this alternative, reversed structure of expectations is highly integrative, allowing a wide range of actions to be incorporated within the basic assumption of opposition. Anything which can be assumed to be detrimental to the other party is potentially part of a conflict system. The destructive consequences of the new conflict system are thus felt in the social system in which the conflict system originated.

129) Luhmann 1984a: 498.

130) Luhmann 1984a: 530-532.

For Luhmann a conflict can develop into an independent conflict system only within another social system. From the covering system's point of view the conflict system is the "excluded, included third" (131). Luhmann describes this relationship with a rather unfortunate and distasteful biological metaphor as a relationship between a non-symbiotic parasite and its host. The metaphor is borrowed from Michel Serres' study on "social" parasites (132). The conflict system is "parasitic" in the sense that it absorbs attention and resources of the "host" system.

Luhmann has not directly applied the idea of a parasitic conflict system to industrial relations. In his "Die Wirtschaft der Gesellschaft", where he discusses the problem of "Labour" as an example of the general problem of scarcity in economics, "Labour" is suddenly described as a "parasite" of the economic system (133). Industrial relations are treated as an old-fashioned semantic of "Capital" vs. "Labour". Although Luhmann does not contest that workers need organized representation of workers' interests (134), he criticizes unions for protecting interests in a mode which leads to inflexible labour markets. In this economic view on industrial relations, unions are seen as instruments in increasing the price of labour despite pressing unemployment (135).

Nevertheless, conflict systems are conceptualized as interaction systems. Conflict systems endure when the conflict can be interpreted to show signs of general societal relevance beyond the limits of the specific interaction. Luhmann sees law and morality as mechanisms which can operationalize societal relevance of conflicts in interaction systems. Where law and morality fail to upgrade

131) Luhmann 1988a: 212.

132) Serres 1980.

133) Luhmann 1988a: 212-223.

134) Luhmann 1988a: 171.

135) Luhmann 1988a: 223-224.

or select individual conflicts as "socially relevant", specific organizations fulfill this function. Luhmann proposes that trade unions can be seen as organizations which select particular conflicts and enhance their status as relevant for the society at large (136).

Luhmann's brief analysis of generalization of the conflict within the conflict system (137) does not consider repercussive effects of the generalization on the conflict system as such. In Luhmann's approach there is no possibility that the conflict system might transform into a different type of system. Thus in his account, a conflict system remains a conflict system despite a tendency towards generalization of conflicts.

However, an alternative scenario can be proposed, which assumes a transformation of the very character of a conflict system through generalization. It assumes that the conflict system can reach a level of autonomy which allows the transformation from negative communication to positive communication. During this process negative double contingency is transformed into positive double contingency. An example can be the development of those industrial relations systems that switch from conflictual communications to joint decision-making. These industrial relations systems change their reproductive basis from negative to positive forms of communication. Thus the generalization of conflicts within a particular host system, which no longer defines the reason for conflicts as half-heartedly included thirds but as own systems problems of wider societal relevance, not only helps to preserve the conflict system but transforms the conflict system from an interaction system into a different form of social system. The conflict system acquires a new identity during this transformation process and domesticizes conflict through

136) Luhmann 1984a: 536.

137) Luhmann 1984a: 535-536.

limiting negative double contingency to situations of adversary negotiations and collective bargaining.

(d) Industrial relations as an immune system of society

Luhmann's theory offers a fourth possibility to conceptualize the industrial relations system as a social system which is related to the idea of an immune system of society. The idea is that contradictions circulate in society and can be activated as conflicts against societal structures. Society needs to protect itself from the destructive consequences of conflicts.

However, the idea of an immune system is not simply to protect society from conflicts. Its function is not to maintain attacked structures and to restore the status quo, but to protect autopoiesis. The function of social immune systems lies in the extension of communication by other means. Thus immune systems do not avoid conflicts but merely offer suitable forms of communication. The overriding aim is to avoid the use of open violence which, among other negative consequences, interrupts communication necessary for the self-reproduction of society (138).

Luhmann emphasizes the destabilizing effects of contradictions on the social system. However, this destabilization is not considered dysfunctional but rather supportive for the evolution of the system. Complex social systems need a certain amount of instability to become able to react towards perturbations both within the environment and within themselves. Examples are changing prices in the economic system, a legal concept in which criticism and even change of the law becomes a normal event and marriages which can be terminated by divorce. It is not possible for the system to assume that things remain as they are. Expectations have to be secured continuously. Instability

138) Luhmann 1984a: 504.

is related to the autopoietic reproduction of the system and not only to unstable structures and expectations. In fact contradictions are not only able to demolish but are also able to replace structures and thus maintain the autopoietic reproduction of the system. Contradictions enable the continuation of action in the absence of the certainty of expectations. Contradictions are the communication of "no" and protect the system against petrification.

Luhmann has demonstrated his idea of an immune system with respect to the legal system (139). The legal system serves as the prime immune system of society which guarantees communication of expectations even in case of contradiction. It permits societal communication to resort to legal forms of communication in the case of communicative break-down in every-day life situations.

The legal system operates as an immune system of society by anticipating uncertainties and instabilities internally before these uncertainties and instabilities occur in society .

Law is created in anticipation of possible conflicts. It secures the continuation of communication in a modified form in case of contradiction in normal communications. Law selects certain expectations and protects them in case of conflict, which creates the basis of normativity of expectations. Experiences with conflict are generalized for this reason in anticipation of future conflicts. In modern societies law invents new problem constellations which in fact, nobody would have thought of, if law did not exist. And law declares the expectations which arise from new problem constellations to be law. Thus law does not serve the function of avoiding conflicts but, in fact, increases the chances for conflict. It simply tries to avoid the violent carrying on of conflicts by providing a means of

139) Luhmann 1984a: 509-512.

communication adequate to the conflict. "Recht dient der Fortsetzung der Kommunikation mit anderen Mitteln." (140) Law is societally adequate when it is able to generate enough conflicts and enough internal complexity to manage these problems.

We might ask whether the industrial relations system can be conceptualized as an immune system similar to the legal system.

I propose to view the industrial relations system as a system complementary to the legal system at the level of society. It serves as an immune system because of the limited capacity of the legal system in handling conflicts. Because of the restrictive entry conditions of the legal system, which requires conflicts to be transformed into individual claims, the industrial relations system can be seen as a second immune system of society which handles collective conflicts. It serves to continue communication in the case of collective conflicts. It provides procedural forms which transform violent collective conflicts into negotiations.

Luhmann's "social immunology" could be further advanced by applying the concept of immune systems to the study of functional subsystems of society. A good example of immune systems at the level of concrete social systems is the industrial relations system. Thus, in addition to the general character of the industrial relations system as an immune system of society, we find a system-specific immune system within the industrial relations system. This system is the grievance procedure and arbitration system which serves in the capacity of an immune system in the collective bargaining system.

140) Luhmann 1984a: 511.

(e) Industrial relations as a functionally differentiated societal subsystem

The four previous characterizations of industrial relations as a social system do not preclude the conceptualization of the industrial relations system as a functionally differentiated societal system on the same plane as the legal, the economic or the political system.

Teubner's application of the idea of a hypercycle, derived from biochemical theories on the origin of life, is not restricted to the emergence of organizations as autopoietic systems. It is equally applicable to the evolution of functional subsystems of society.

Teubner describes autopoiesis as resulting from a three step autonomisation of social systems from self-observation to self-description to autopoiesis of social systems. Autopoiesis or self-reproduction emerges from a cyclical relation of cyclical system components (= hypercycle).

"Gesellschaftliche Teilsysteme gewinnen steigende Autonomie, wenn im Subsystem die Systemkomponenten (Element, Struktur, Prozess, Identität, Grenze, Umwelt, Leistung, Funktion) selbstreferentiell definiert sind (= Selbstbeobachtung), wenn zusätzlich diese Selbstbeobachtungen als Selbstbeschreibungen im System operativ verwendet werden (= Selbstkonstitution) und wenn schließlich in einem Hyperzyklus die selbstkonstituierten Systemkomponenten als einander wechselseitig produzierend miteinander verkettet werden (= Autopoiesis)." (141)

Teubner proposes a gradual evolution of autopoietic systems. He assumes that self-reference is not limited to elements (parts) but occurs with respect to other system components, i.e., structure (networks), process (production), boundary and environment (space) and the system as a whole (unity). For Teubner the hypercycle, i.e. cyclical combination of cyclical self-description of self-

141) Teubner 1987b: 101-102.

reference, is thus not confined to self-reference of elements but equally applies to the other system components.

Teubner has demonstrated the idea of a hypercycle with respect to the cyclical relations of the four components of the legal system: Legal procedure, legal action, legal norm, and legal doctrine. In the development of the legal system from diffuse societal law to a state of relative autonomy, and then to full autopoiesis, these components first acquire identity by a process of self-reference and are connected hypercyclically in a second process to form the autopoietic legal system (142).

Combination of episodes (143) is a mechanism which equally applies to the industrial relations system. Interactions are episodes in the "carrying on" of society. Structures created in industrial relations episodes are used in later episodes. Independent industrial relations discourses with elaborate grievance procedures and collective bargaining styles evolve from these structures. In the end an industrial relations culture evolves.

It is possible to construct an autopoietic industrial relations system in analogy to Teubner's construction of an autopoietic legal system. Procedures, action, norms and a retained body of knowledge can be found in the industrial relations system as well.

Teubner distinguishes three stages in the evolution of a legal system: Diffuse societal law, relatively autonomous law, and autopoietic law. Industrial relations consist of diffuse societally produced system components. Workplace industrial relations rules which are not introduced through procedures but are followed repetitiously for reasons of tradition are examples of such a state of an industrial relations system.

142) Teubner 1989, graph on p. 50.

143) Teubner 1987b.

An industrial relations system has become partly autonomous when one or more of its components become self-referential. Examples of this, by analogy to secondary legal rules, are norms of recognition of employee representatives in grievance procedures or collective bargaining which regulate the creation of norms.

The industrial relations system is hypercyclically structured when its components are not only engaged in self-reference but when the relations of its components become recursive. In an autopoietic system the elements rely on references to other system components to constitute themselves. Elements and structure become two mutually referential system components. Actions of the industrial relations system (elements) are used to define rules (structure) and rules are used to define industrial relations action (which should not be confused with industrial action).

Teubner's hypercycle concept is thus highly suggestive of a conception of an industrial relations system as a social system. It differs from Luhmann's concept which insists that autopoiesis characterizes all social systems and that social systems are by definition autopoietic and cannot be partly autopoietic and partly allopoietic (144). According to Luhmann social systems do not differ with respect to autopoiesis. They can only differ with respect to the degree of differentiation from their societal and other environments and with respect to the degree of internal and external complexity.

Teubner's concept has the advantage of discussing the crucial question of the historical origin of autopoietic systems. Luhmann's approach seems contradictory in this respect because he adheres to a theory of differentiation of society in which autopoietic function systems are

144) Luhmann 1987e: 318-319.

achievements of evolutionary processes but he resists conceptualizing the historical origins of a particular social system before it has become an autopoietic social system.

The Industrial Relations System as a Social System.

A Proposal

I propose to view the industrial relations system as a functional subsystem of society on the same plane as the legal, the economic or the science systems. The industrial relations system has constituted itself as a fully-fledged functional social system. Although it is possible to characterize it as a conflict system within the economic system and as an immune system of society, these characterizations cannot grasp the entire nature of the industrial relations system in modern societies. Thus, in my view the modern industrial relations system is best understood as a functionally differentiated subsystem of society.

This proposal can be demonstrated by discussing the four hypotheses which Luhmann has outlined in his analysis of the economic system as a "catalogue" for the empirical testing of the existence of a social subsystem (145). In applying these hypotheses the industrial relations system can be characterized in the following way:

- Form and scope of differentiation have reached a level in modern societies which makes an autonomous industrial relation system possible that is not dominated by other function systems.

145) Luhmann 1988a: 51.

- The industrial relations system operates with a specific combination of closure and openness with respect to its elementary operations.
- The industrial relations system operates under a binary code which represents the exclusive function of the system.
- The industrial relations system has achieved a relative prominence in society at large in its ability to arrange corporatist exchange relations with other function systems to further its autonomy.

The following outline of the proposal for a model of industrial relations as a social system discusses these four hypotheses separately.

(a) Differentiation of an Industrial Relations System

Modern societies are functionally differentiated societies. Such a society has overcome the hierarchical mode of integration which was characteristic of stratificatory societies. A primary mode of integration in modern societies is a vertical order of mutual recognition of functional subsystems. Each function system is exclusively responsible for fulfilling its societal function.

It might be argued that the industrial relations system is not a full-blown autopoietic system. Teubner could argue in analogy to his idea of steps in the autonomisation of the legal system, that the industrial relations system consists of autopoietic interaction systems but lacks the hypercycle of recursive relations of system components and therefore, has not yet reached the status of a functionally differentiated autopoietic system on the same plane as the

economic or the legal system (146). In my view this is partly a question for the theory of an autopoietic industrial relations system and partly an empirical question about the stage in the development in the industrial relations system. My preliminary answer is that more signs point in the direction of a fully-fledged autopoietic function system.

Self-reference of the elements of the industrial relations system is not only a theoretical supposition but an empirically observable phenomenon. Institutions and the structure of the industrial relations system are based on self-reference. However self-reference of collective communications is a highly improbable process.

In these modern societies industrial relations have developed into autopoietic function systems which are recognized by other function systems. Industrial relations have developed from a conflict system into a societal subsystem which defines itself with respect to fulfilling a function in society at large.

The function of the industrial relations system is to manage collective violence, which can occur in the relations between industrial interest groups.

Luhmann has embarked on problems of industrial relations in two contexts: In his analysis of the economic system and in his semantic studies of self-descriptions of modern societies. In his sociological analyses of the economic system he discusses the history of "Labour" only as the history of parasites of the economic system (147). "Labour" is a semantic problem related to the economic problem of scarcity. Although Luhmann senses that "Labour" indicates a different relation to the society at large which

146) Teubner 1989: 49-56.

147) Luhmann 1988a: 213-223.

cannot be captured by the code of the economic system (148), he does not analyze "Labour" apart from the economic system.

Luhmann has further analyzed "Labour" in its semantic opposition to "Capital" as representing two classes of society. His discussion of class theory is meant as a contribution to a description of self-descriptions of the modern society at large. Luhmann admits that the opposition of "Capital" vs. "Labour" as representing two classes of society has advanced beyond a mere scientific analysis of society. It has, in fact, achieved the status of a widely shared self-description of society. However, for Luhmann class society means a self-description of the modern society as a hierarchically ordered society. Thus, for Luhmann, the semantic of "Capital" and "Labour" represents an inadequate self-description of modern society. It is an attempt of society to resist recognition of its functional differentiation into polycentric, horizontally ordered function systems (149).

If Luhmann had studied the self-descriptions of the industrial relations system, he might have detected that it has achieved the status of an independent function system in society. The opposition of labour and capital has formed a negotiation system which has become self-reproductive.

The industrial relations system is characterized by special forms of interactions between collective actors, which are known as strike activities. The understanding of these interactions has changed. These changes in the self-descriptions indicate a development of the industrial relations system. Whereas the modes of regulation of

148) Luhmann 1988a: 222.

149) Luhmann 1985b: 148-150 and 1988b: 168-176. Luhmann holds the Marxist "semantic" of "Capital" and "Labour" responsible for diverting societal communication from discussing the real problems of modern societies by triggering and perpetuating conflicts which are unrelated to the overwhelming and urgent "ecological" dangers of our societies. See also Luhmann 1988a: 169.

strikes are the main concerns of industrial relations in its pre-autopoietic phase, the nature of its elements, i.e., collective negotiations, as conflictual or cooperative becomes prevalent in autopoietic industrial relations. Thus the self-descriptions of the system increasingly relate to the self-reproduction of its basic communications. Industrial democracy is a form of self-description of industrial relations which emphasizes codetermination or participation between the collective actors.

These self-descriptions also reflect different forms of regulation of the industrial relations system, and in particular the transformation from external regulation to self-regulation. Regulation of industrial relations has historically evolved from regulation of industrial action, to regulation of arbitration and other forms of third party facilitation to self-regulation of negotiations by self-created agreements. This history of industrial relations is reflected in the order of regulatory instruments in modern collective bargaining. However, it appears in this order in a reversed form: First negotiation, then arbitration, then industrial action.

Industrial relations fulfill the societal function of managing conflicts between collective actors. From the society's point of view the function of the industrial relations is the management of collective violence. However, modern industrial relations have advanced beyond the status of a conflict system. Interaction of collective actors occurs in the shadow of conflicts, i.e., strikes and lock-outs. Negotiations both avoid and make creative use of these forms of collective behaviour or collective violence.

Most industrial relations systems are conflict systems in the beginning of their development. However, once industrial relations systems have developed structures of formalized negotiations these not only express the relevance of the conflict both for the host system and the society,

but they acquire a function as institutions of conflict resolution for both the host system and society.

Otto Kahn-Freund has provided insightful remarks on how autonomous industrial relations, which manage conflict to achieve a number of purposes, can nevertheless revert to open conflict systems. He defines as the "cardinal feature of labour-management relations" that "it is the conflict itself which gives rise to the formation and consolidation of groups and to the establishment of the relevant social relations as group relations." (150)

For Kahn-Freund it is not so much the aspect of the conflict relation defined as "negative communication" between the collective actors but the conflict as form of interaction between unions and employers' associations which leads to progress in the industrial relations system. Open conflict is gradually reduced and transformed into an instrument which becomes "the sparingly used ultima ratio in the arsenal of the groups". However, Kahn-Freund noticed a danger of reversal to "primitive" forms of conflict behaviour in complex conflict systems which rests on intergroup relations:

"Eventually this may lead to a situation in which the element of spontaneity appears in the intragroup rather than the intergroup sphere: The dissatisfaction of the workers may be directed against the union itself on account of the deliberateness and moderation of its action. It may find expression in 'unofficial' or 'wildcat' strikes, i.e., labour conflicts conducted on the workers' side by spontaneous and ephemeral 'strike committees' frowned upon by the recognized unions. At this point the story of the eternal dialectic of spontaneity and organization in labour relations may return to its beginning: the danger of a relapse into more primitive forms of conduct is inherent in the rigidity of the social patterns of the labour dispute at the highest point of its development." (151)

150) "Intergroup Conflicts and Their Settlement" in Kahn-Freund 1978: 42.

151) Kahn-Freund 1978: 44-45.

Thus Kahn-Freund is well aware that industrial relations remains a conflict system which can reverse into open conflict. However, the tendencies of joint decision-making introduce a new quality to the relation of collective actors. The perception of industrial action as disruption of communication, even beyond the realm of industrial relations within the industrial relations system, leads to a new understanding of industrial action. Industrial relations become responsive to societal needs which are mainly expressed in the form of dissatisfaction with collective violence.

Industrial relations maintain the character of a conflict system when the relations of unions and employers are dominated by what industrial relations research has coined the adversarial principle (152). Adverse industrial relations operate under the maxim "what is bad for my enemy is good for myself". As long as this attitude dominates the behaviour of actors the autonomisation of the industrial relations system is inhibited. The communication in the conflict system is restricted to negative communications with the "host" system. However, in reality industrial relations create themselves from communication structures which substitute for the dependency on negative links with the economic communications.

(b) Operational Closure and Cognitive Openness

Autopoietic industrial relations are operationally closed and cognitively open. The elements of the industrial relations system, i.e., its communications, are constituted in self-referentially closed operations. Because autopoiesis or self-reproduction is guaranteed by closed

152) See Barbash 1979 and 1984.

communication circuits, the industrial relations system can be open towards its societal environment.

The elements of an autopoietic industrial relations system are communications between collective actors. If the collective communications are defined as negotiations they are perceived as actions of the industrial relations system. Negotiations within an industrial relations system can be called "industrial relations acts", in analogy to "legal acts" which Teubner proposes as the self-constituted elements of an autopoietic legal system (153).

Industrial relations acts constitute the core of the industrial relations system as a social system. In particular, negotiations in collective bargaining are seen as such industrial relations acts. Luhmann's discussion of communication, action and the system is directly applicable to an industrial relations system. The industrial relations system defines behaviour of collective actors only as industrial action if it is linked to negotiations within the collective bargaining system. However, this link is entirely a product of the collective bargaining system. Thus collective bargaining is defined as industrial action within the industrial relations system only when it is recognized as industrial action in collective bargaining.

Furthermore, each negotiation can be seen as a form of action. The collective bargaining system observes and describes itself as a system of negotiations. Negotiations are the communications "produced" by previous communications relevant to the self-reproduction of the system. Reference of negotiations in collective bargaining to previous negotiations contains the self-referential process which guarantees the autopoiesis of the industrial relations system. Thus the realization as negotiation system is the mode of self-reference which constitutes the basis of its

153) Teubner 1989: 42.

autopoiesis. On this basis of operational closure the industrial relations system can be open to establish intersystemic links.

Industrial relations research is used to discuss problems of operational closure and cognitive openness under the heading of the autonomy of industrial relations. The concept of autonomy of industrial relations, and in particular of collective bargaining, has a long history in the debates both of external regulation through state intervention and of self-regulation of the industrial relations system. However, autonomy is usually discussed with respect to the structure of the industrial relations system, and thus with respect to the capacity of its institutions to regulate the system's affairs. The system theoretic analysis relates the autonomy of the system to the self-reproductive processes and understands autonomy as a necessary condition to protect autopoiesis.

The radical view is that the industrial relations system creates the grievances and claims because it defines which conflict is treated as a "grievance" or "claim" in the industrial relations system through reflexive processes. This perspective does not deny that grievances or claims are defined by the individual grievant or claimant or by the union. It only assumes that grievances or claims when treated in the grievance machinery or in the collective bargaining system as products of previous communications inside the system, are influenced by the structure of the system which has a specific effect on the occurrence and definition of grievances as industrial relations acts.

(c) The Code of the Industrial Relations System and its Operation

The core operations in the system of industrial relations are self-referential processes which constitute its autopoiesis. A major pre-condition for autopoiesis is the ability of the system to distinguish its elementary communications. The industrial relations system must select its elements from societal communications. This selection of communication is carried out by applying a code which is specific to the industrial relations system.

Thus industrial relations must possess a binary code in order to operate as an autopoietic function system. With a system specific code it becomes able to draw a distinction between those elements which it considers to belong to the system and those which belong to the environment. The binary code reflects the function of the industrial relations system. Only if the application of the code is guaranteed can the industrial relations system be called autonomous and autopoietic.

Luhmann calls the invention of codes the technically most efficient and consequential form of differentiation of function systems. The main function systems structure their communication with a binary code which claims universality with respect to the respective specific function and also claims the exclusion of third possibilities (154).

Luhmann has analyzed several binary codes of function systems. He defines the code for the scientific system to be the opposition of truth and untruth; the code of the economy is payment and non-payment; and the code of the legal system is law and non-law.

I propose to call the binary code of the industrial relations system negotiable or non-negotiable between

154) Luhmann 1990a: 75-76.

collective industrial actors. Like other binary codes the code of the industrial relations system entails a paradox insofar as the code itself cannot be justified by applying the code. The distinction between negotiable and not negotiable is itself not negotiable for the industrial relations system.

It is possible to demonstrate the idea of element and structure of autopoietic industrial relations in reconstructing the recent definition of industrial relations offered by Walter Müller-Jentsch. This definition includes major features of a definition of industrial relations as an autopoietic social system:

"Arbeits- oder industrielle Beziehungen bezeichnen jene eigentümliche Zwischensphäre im Verhältnis von Management und Belegschaft, von Arbeitgeberverbänden und Gewerkschaften, deren eigentlicher Gegenstand friedliche oder konflikthafte Interaktionen zwischen Personen, Gruppen und Organisationen sind, sowie die aus solchen Interaktionen resultierenden Normen, Verträge und Institutionen." (155).

Müller-Jentsch emphasizes that interactions between persons, groups and organizations are the object of industrial relations from which norms, contracts and institutions result. In systems theory terms he identifies interactions as relations of communications from which the structure of the system derives. Interactions appear in this definition as abstractions which inhabited complex relations between management and employees, employers associations and unions or between persons, groups and organizations; and these relations can be conflictual or consensus oriented. However, the main radicalization of autopoietic systems theory in the study of industrial relations lies in the analysis of the self-reproductive process. Interactions and their derivative institutions form conditions and programs for operational closure and cognitive openness. Interaction in industrial relations is

155) Müller-Jentsch 1986: 17.

communication which produces communication. Collective bargaining produces new collective bargaining, grievance processing produces new grievance processing.

The industrial relations system is a complex system which creates its structure by selecting among certain relations of its elements. The introduction of the criterion collectivity is such a selection. Collectivity is both an abstraction from individual relations and a way to reduce the complexity of relations of employees and employers to those communications in which collective representatives operate on behalf of the employees.

When industrial relations are conceived as social systems which operate in a society consisting of several functionally differentiated social systems they have to manage both the internal and the external complexity. In fact industrial relations have to manage a higher internal complexity than most other function systems of society. This is related to its specific form of organization, or, more precisely, the requirement of interaction between organizations. The vast majority of function systems including the religious, the political, the economic, the legal and the scientific systems, adopt organization as their form of achievement of function and production of performance. In his analysis of the economic system (156) and the scientific system (157), he emphasizes competition among organizations as a structural principle. Fulfillment of function needs openness, which is usually guaranteed by a plurality of organizations (competition among political parties, universities, corporations). Industrial relations are characterized by reflexive organization, i.e. organization of organization. However even among reflexive organizations competition is possible. In addition to union

156) Luhmann 1988a: 302-323.

157) Luhmann 1990c: 672-680.

competition and competition among employer organizations a plurality of forms of collective bargaining is possible.

(d) Intersystemic Relations of the Industrial Relations System in Society

The relation of the industrial relations system to other second order social systems is described by Luhmann as one of performance rather than function. In functionally differentiated societies social systems have to relate to each other "horizontally" through performances; the function describes the relation with society. A relation of performance between two second order social systems is established when the means used by one system to achieve a certain effect in another system are compatible with the structure of the other system (158).

Luhmann's distinction of function and performance enables one to criticize the inflationary use of the term function in industrial relations research. Walter Müller-Jentsch (159), for example, defines several "functions" of collective bargaining which are in some cases better described as performances of the industrial relations system. His list of collective bargaining functions include protection of living standards, distribution of income and contribution to industrial democracy are not only benefits for employees but also performances of the collective bargaining system for the economic system. The creation of uniform conditions of production through standardization of wages and working time and through reinforcement of stable wage structures and working conditions are performances which benefit the whole group of employers. And the autonomy of collective bargaining benefits the state insofar

158) Luhmann 1981: 84.

159) Müller-Jentsch 1986: 158-202.

as it relieves the political system from regulating working conditions; it increases rather than decreases the legitimation of the state and the government. Furthermore, what Walther Müller-Jentsch calls "societal effectiveness" (gesellschaftliche Effektivität) of collective bargaining describes, in fact, the function of collective bargaining and, indeed, of the whole industrial relations system, when he considers it to contain and canalize conflicts (160).

Several advanced industrial relations systems have developed their performance relations with the political and the legal system into intersystemic exchange relations. These exchange relations are described as tripartite corporatism. However, the intersystemic relations between the industrial relations system and its surrounding neighbour systems can only flourish when the industrial relations system is secure in its own autonomy and autopoiesis. Corporatist arrangements can only benefit the industrial relations system if it is strong enough to resist direct determination and can use corporatist arrangements for internal creation of structures. And the political and legal systems benefit only from participation in corporatist arrangements as long as the industrial relations system can offer performances which are useful for their internal communications. The political and the legal system will only maintain their support in the long run when the industrial relations system is strong enough so that the other systems can receive something in return for their contribution to the industrial relations system which lies in their participation in corporatist networks. Thus autonomisation and interdependence are not exclusive but co-evolutionary processes (161).

Although there are a number of discussions in Luhmann's work which are related to problems of an industrial

160) Müller-Jentsch 1986: 160.

161) See also Willke 1989: 90 and Rosewitz and Schimank 1988: 298-304.

relations system, he has not directly applied his theory and analyses of social systems to a discussion of industrial relations as a social system. This might have theoretical reasons. But it might also be due to Luhmann's anti-marxist convictions. Luhmann resents that the "exhausted" Marxist theory of society dominates both a number of discourses within sociology and descriptions of our system of society (162). Luhmann's anti-marxism, however, should not prevent research from describing industrial relations as a social system. In fact, Luhmann's self-inflicted resistance to industrial relations leaves some space for his students to advance autopoietic systems theory and to apply it to one of the rare fields which have not been treated by an exhaustive study by Luhmann himself.

In particular Luhmann's many studies on the semantics of societal processes, i.e., self-descriptions of society and its function systems, are highly suggestive for industrial relations research as well. In an autopoietic view the processes of self-observation and self-description are constitutive of the self-reproduction of the industrial relations system. Empirical material on self-descriptions can be found in professional journals which contain the relevant information on collective bargaining agreements, strike statistics, so-called "legal" material and other background information for the negotiation process. These journals have been widely neglected in industrial relations research.

Industrial relations is fragile as an autonomous function system because the organization of collective bargaining depends on the future of interest representation. The autopoiesis of collective bargaining requires an organizational structure which protects it not only from interventions from other social systems like the political, the economic and the legal systems but also from

162) Luhmann 1988a: 168.

fluctuations and changes in the unions and employer associations.

Trade unionism is in decline worldwide. There is a precarious link between the labour movement and the collective bargaining system. They are structurally coupled and interfere at several levels. The realization of the unions' dependence on collective bargaining might give them a chance to develop a strategy of survival. Interest organizations can legitimate themselves through participation in collective bargaining. Furthermore, they can internally structure themselves around collective bargaining. Nevertheless, the industrial relations system will have to achieve a greater independence from unions and their influence. It will have to emancipate itself as an autonomous system from the participating organizations.

CHAPTER II

LABOUR CONFLICT RESOLUTION IN THE INDUSTRIAL RELATIONS SYSTEM

Labour conflict resolution is related in specific ways to the core of the industrial relations system, i.e., autonomous collective bargaining.

The function of labour conflict resolution in the industrial relations system is to secure the system of collective bargaining. Processes and procedures of labour conflict resolution provide the possibility to continue communications between the collective actors in case of a breakdown of negotiations in collective bargaining. In this sense the procedural system of labour conflict resolution can be characterized as an immune system of the collective bargaining system.

An external observer of the industrial relations system is able to detect a couple of other "functions" which are attached to labour conflict resolution. However, which "function" is emphasized depends on the system reference of the observer. An observer from the political system, for example, mentions the prevention and absorption of collective violence, and a legal observer highlights individual employment protection or the filtering of conflicts which have a propensity for litigation. From a systems theoretical perspective, it is important to distinguish between functions and performances of labour conflict resolution and to name these other "functions" rather performances or services for other social systems. The thesis of this chapter is that labour conflict resolution can service the legal, the political or the economic system only insofar as it is linked to the

autopoietic system of industrial relations for which it functions as a system-specific immune system.

Chapter II proceeds by expounding the relationship between collective bargaining and labour conflict resolution. The history, functions, performances, reflexions and autonomy of collective bargaining systems are discussed with respect to the four countries under comparison. Their arbitration systems are introduced as immune systems of the collective bargaining systems. Procedural aspects of negotiation and arbitration procedures and the role of litigation in industrial relations interactions are discussed. And in a final section, different forms of tripartite cooperation between unions, employers and the state are described as corporatist arrangements. These corporatist structures are purported by the institutions of labour conflict resolution. However, they also shape the modes of labour conflict resolution at the different levels of collective bargaining.

Collective Bargaining and Labour Conflict Resolution

In a systems theoretical account, collective bargaining is described as a system of recursive collective communications. These communications normally occur in autonomous negotiations between collective actors which are structured by procedures. Collective bargaining occurs in advanced industrial relations systems at three levels: (a) negotiations between local unions, shop stewards or elected worker representatives and single employers at the company level; (b) negotiations between trade unions and employer associations at the sectorial level; and (c) negotiations of peak associations with state officials at the national or federal level.

Thus collective bargaining appears in several forms, it can happen on different levels, and it has a number of societal functions. All four countries under comparison have seen phases in the historical development of industrial relations in which the struggle for autonomy of collective bargaining became a major concern. The history of collective bargaining structures reveals the importance of labour conflict resolution and the development of self-regulatory mechanisms to achieve internal autonomy in collective bargaining which guarantees external autonomy, i.e., independence from other social systems based on their recognition of industrial relations as a social system. Thus, for the study of labour conflict resolution, the transformation of the collective bargaining systems from a concern with external autonomy to a concern with internal autonomy is particularly interesting.

The History of Collective Bargaining

The collective bargaining histories of the four national industrial relations systems under comparison are the context in which systems of collective labour conflict resolution developed. The history of industrial relations must be understood as an intertwined history of both the development of the industrial relations organizations and the autonomisation of the collective bargaining system.

Great Britain

Collective bargaining in the form of "shop-bargaining" and even district bargaining occurred in Britain even before the establishment of trade unions. However, as the Webbs showed, the system of collective bargaining only became

viable once trade unions provided the machinery for its application. Trade unions brought "continuity and elasticity" (1) to collective bargaining. British trade unions were only gradually legalized in the 19th century. Because of restrictive combination laws trade unions organized in the form of friendly societies, which provided only limited protection from regular, although unpredictable, prosecutions (2). The Combination Law Repeal Act of 1824 brought limited recognition of the freedom of association; however, only one year later Peele's Combination Act of 1825 precluded the freedom to strike by penalizing undefined crimes of violence, threats, intimidation, molestation and obstruction. Nevertheless, these combination laws of 1824-1825 had the effect that "the right of collective bargaining, involving the power to withhold labour from the market by concerted action, was for the first time expressly established" (3).

Collective bargaining as a system of negotiations between collective actors developed through self-regulation. Especially in the period from 1867 to 1875 "innumerable Boards of Conciliation and Arbitration were established, at which representatives of the masters met representatives of the Trade Unions on equal terms." (4) This development was supported by a change in law. The Councils of Conciliation Act of 1867 repealed the unsuccessful Arbitration Act of 1824 which had introduced licensed Councils of Conciliation consisting of Justices of the Peace acting as arbitrators. The 1867 Act and the Arbitration (Masters and Servants) Act of 1872 supported the voluntary establishment of joint councils and the adoption of codes of work rules agreed upon between employers and workmen. In the aftermath of the Acts local negotiations and local joint committees were

1) Webb 1920b: 179.

2) Webb 1920a: 64-93. See also Thompson 1968: 543-569.

3) Webb 1920a: 108.

4) Webb 1920a: 337.

established which led to a stabilization and to a "sturdy growth" of collective bargaining (5).

The legal situation improved for trade unions in the 1870s, in particular with the Conspiracy and Protection of Property Act of 1875, which restricted crimes relating to picketing and other strike activities through codification. When unions began to organize unskilled workers after 1875 (their so-called second formative period (6)) and when, after a number of major strikes, the employers began to organize themselves and to recognize trade unions, a system of sectorial and national collective bargaining could gradually develop in the 1890s (7) despite large-scale rank-and-file dissent within trade unions (8). Without much support of the law (9), this system developed from negotiations of groups of craftsmen and employers to sectional and national bargaining between recognized "new model" unions and employer associations.

Around the turn of the century, collective bargaining in Great Britain received both extreme hostility from the judicial system and strong encouragement through state intervention. It was supported and endorsed by state policies which shifted from mere recognition of the freedom of association, as the right of free men, to a view of unions as positively contributing to social welfare through their participation in collective bargaining (10). In 1894 the Royal Commission on Labour officially recognized in its final report collective bargaining and voluntary collective negotiations as the preferred methods for government

5) See Sharp 1950: 280-290.

6) On "new unionism" see Webb 1920a: 358-421, Clegg et al. 1977: 1-96 and Hinton 1982. See also Kahn-Freund 1977: 69 on the impact of "new unionism" on labour law.

7) See Clegg 1979: 66 and Clegg et al. 1977: 471: "The development of collective bargaining was the outstanding feature of this period" from 1899 to 1910.

8) See Gore 1982.

9) See Kahn-Freund 1983b, ch. 4.

10) See Clegg et al. 1977: 485.

policies in the field of industrial relations. And the Conciliation Act of 1896 encouraged conciliation and voluntary arbitration in support of collective bargaining. This state policy of encouragement of collective bargaining through dispute settlement was continued with the Industrial Court Act of 1919, which established Courts of Inquiry and a machinery of voluntary arbitration through Industrial Courts (11), renamed Industrial Arbitration Board in 1971 and Central Arbitration Committee in 1975.

For three quarters of a century, until the 1970s, British state policies towards industrial relations were dominated by the concepts of voluntarism and collective laissez-faire of the collective parties and abstentionism with respect to state intervention. This British policy of "voluntarism" was initially directed against the Courts, which had adopted a hostile attitude towards the unions throughout the 19th century. Indeed, the exclusion of courts created the basis of voluntarism, as Lord Wedderburn has described the process with much insight.

"The reaction against legal attacks on unions by the nineteenth-century courts is a major reason why modern negotiating structures came to be built upon the autonomous arrangements of the parties (employers and unions) rather than upon legal devices and structures, such as bargaining units regulated by legislation" (12).

Within the industrial relations system, law was perceived as repressive and as a means for hostile courts to interfere in internal industrial relations affairs. Protective statutes were only enacted after disastrous court decisions. The 1875 Act, for example, which effectively decriminalized the unions was a reaction to the outrageous attempt to criminalize unions in *R. v. Bunn* (13); and the

11) On the development of voluntary arbitration see Turner-Samuels 1951: 261-282 and Sharp 1950: 290-305 and 347-368.

12) Wedderburn 1986: 272.

13) *R. v. Bunn* [1872] 12 Cox 316.

Trades Disputes Act of 1906, which granted unions immunity from civil liability, was a reaction to the famous Taff Vale decision of the House of Lords, which had held unions liable in tort (delict) for the acts of their officials in the course of a strike (14).

However, after trade unions had achieved immunity through the Trade Disputes Act of 1906 (15) and after official state policies had endorsed the policy objectives of voluntarism and abstentionism, trade unions gained enormously in social and political status (16). The state came to favour trade unionism and collective consultation even in the public sector. The Whitley Committee, established during WW I, recommended Joint Industrial Councils which "welded" organizations of workers into the system (17). The trend towards centralized bargaining continued between the wars. The coverage of collective bargaining increased even faster than trade union membership. By 1933 almost nine million British employees were covered by collective bargaining agreements (18).

The hostility of the legal system to industrial action and the collective organization of workers prevented the use of law for the creation of internal structures in the industrial relations and collective bargaining system. The Arbitration Acts of the 19th century, which introduced compulsory arbitration, were largely ineffective (19). Independent of the state, British industrial relations developed their own voluntary institutions of conflict resolution. The collective bargaining agreement was from the outset not only an alternative source of substantive

14) See Taff Vale Railway Co. v. Amalgamated Society of Railway Servants [1901] AC 426.

15) See only Clegg et al. 1977: 305-325 and 393-395 and Brown 1982.

16) Webb 1920a: 645.

17) Wedderburn 1986: 272.

18) Clegg 1985: 547-550.

19) See Sharp 1950: 273-289.

regulation. It also established a machinery of dispute resolution through regulation of procedures. However, voluntaristic state policies both supported and instrumentalized the self-regulatory capacities of the British industrial relations system.

It is the outstanding characteristic of British collective bargaining that the emphasis is on arbitration and conciliation procedures rather than upon substantive rules. Otto Kahn-Freund emphasised this point in contrasting the British "dynamic" model with the German "static" model of collective bargaining (20).

"In the 'dynamic' system the emphasis is on the fixed and permanent constitution and procedure of the 'machinery' and not on the flexible and easily changeable substantive norms which it creates." (21)

British industrial relations developed a "non-statutory and non-governmental machinery" of voluntary conciliation and arbitration (22). In conjunction with collective bargaining permanent joint committees or joint councils were erected in a number of industries. British collective bargaining thus emerged from the institutions of labour conflict resolution.

The non-legal character of the British collective bargaining system is still a major characteristic of the system. With the exception of the brief period of the Industrial Relations Act from 1971 to 1974 the collective agreement has never been legally enforceable. The Industrial Relations Act of 1971 was rejected jointly by unions and employers, who refused to obey the law by incorporating the TINALEA clause ("this is not a legally

20) Kahn-Freund 1978: 52-55 and 1983: 70-72.

21) Kahn-Freund 1978: 53.

22) See Turner-Samuels 1951: 1-126 on the "Non-statutory and Non-governmental Machinery" and, in addition, Sharp 1949: 1-269 on "Voluntary Conciliation and Arbitration in Selected Industries".

enforceable agreement") in almost all collective bargaining agreements. Since the repeal of the Industrial Relations Act in 1974 the system of collective bargaining has kept its voluntary nature, despite the restrictions on industrial action and on union activities in general introduced by the Thatcher labour laws during the 1980s.

Thus Allan Flanders' description of the British system of collective bargaining, which he submitted as evidence to the Royal Commission on Trade Unions and Employer Associations, known as the Donovan Commission, is still accurate. During this official investigation of the system of British industrial relations, he outlined three principles of industrial relations which he considered to be the system's main characteristics:

According to Flanders a priority is accorded in British industrial relations (a) to collective bargaining over other methods of external job regulation; (b) to procedural over substantive rules for the regulation of collective bargaining; and (c) to voluntary over compulsory procedural rules for collective bargaining (23).

Along with centralized bargaining there developed plant bargaining in Great Britain. Shop stewards established an independent system of job regulations. After the 1960s the number of shop stewards and the significance of plant bargaining increased considerably (24). They were diagnosed as the factors for an "inevitable growth of informality" in workplace industrial relations (25). Batstone reports for the 1980s a stabilization of the shop steward organization. The range of plant bargaining increased; and, contrary to several predictions, a significant centralization of plant bargaining did not occur (26). In fact, Britain has

23) Flanders 1970: 94-99.

24) Clegg 1979, ch. 2, Degen 1976 and Batstone 1988, ch. 3.

25) Terry 1977.

26) Batstone 1988, ch. 3 and ch. 4.

solidified its decentralized system of collective bargaining.

A new trend in British collective bargaining is the single union agreement which adds to decentralization. In some companies multi-union bargaining is replaced by recognition and procedure arrangements with a single union enjoying exclusive bargaining rights. Arbitration procedures are replaced by joint advisory councils made up of management and elected employee representatives which recommend solutions for problems occurring in local union-management negotiations (27). The single union agreements do not aim at joint decision-making. The joint committee has only consultative rights and management retains the final responsibility. Keith Sisson predicts that the future of British personnel management will continue to show a considerable variety of practice. These include human resource management, which emphasizes bargaining with the individual employee, and consultation, which emphasizes constructive relations with the unions. Consultation, which incorporates unions into the organizational fabric of the company, is likely to become a necessity due to European company and competition law resulting from the Single European Market.

United States

In contrast to Britain the early development of collective bargaining structures was initially supported in the U.S. by courts expressing, according to Commons and Andrews, "common consent and favorable construction" (28). In 1842, in *Commonwealth v. Hunt* (29), the Supreme Court of

27) See the description of a single union agreement in Fox 1987: 613.

28) Commons and Andrews 1916: 95.

29) *Commonwealth v. Hunt*, 45 Mass. (4 Metcalf) 111 (1842).

Massachusetts agreed to a strike which was carried out to establish a closed shop. Thus the right to strike which the employees gained in England through legislation in the 1870s was granted to them in the U.S. without legislation at a much earlier time.

However, this judicial policy could not be sustained due to a lack of legislative support. The lawmakers did not repeal the law of conspiracy. And the resurgence of the use of conspiracy law in the 1880s "became once more a serious menace to collective action by labor" (30). Concerted activities were treated as conspiracies which restrained trade. The emphasis shifted from criminal to civil liability. Civil courts issued injunctions against concerted activities in support of unionization. The procedure was extremely one-sided in favour of the employers. Restraining orders were "promptly secured on the basis of stylized affidavits, the truth of which often could not be challenged because they were presented to the judge ex parte, without notice to the employees" (31). In addition, the antitrust law (Sherman Act) proved to be a flexible instrument to outlaw unions. In the famous Danbury Hatters case in 1908 (32) antitrust law was used against a union boycott which was considered a restraint of trade, and the union was subjected to triple damages. Congress subsequently diminished the unions' exposure to antitrust liability by passing the Clayton Act in 1914.

In 1916 Commons and Andrews still reach the conclusion that the law "seriously restricts labor in its collective action, while it does not interfere with the parallel weapons of the employers". They argue for equal conditions for unions and employers. It is remarkable that they base their arguments on a notion of what they call "true collective bargaining". Employers and unions should be

30) Commons and Andrews 1916: 91-112 (96).

31) Gorman 1976: 1-2.

32) Loewe v. Lawlor, 208 U.S 274 (1908).

allowed complete freedom to combine. "Restrictions in the law upon collective action upon either side are inconsistent with collective bargaining" (33).

Restrictions in law were not the only threat to collective bargaining. New methods of "scientific management", later known as Taylorism (34), developed an understanding of intra-plant-bargaining as "intimate cooperation of the management with the workmen, so that they together do the work in accordance with the scientific laws which have been developed" (35). The scope of collective bargaining was reduced to joint application of so-called scientific laws of management.

In the 1920s the advocates of unionization and collective bargaining were opposed by the majority of employers who combined to execute hostile industrial relations strategies. Even "Progressive" employers engaged in experiments in joint determination like employee representation, shop committees and shop councils rather than in collective bargaining with the unions of the "American Federation of Labor" (AFL) (36).

The situation changed with the New Deal in the 1930s. After the Depression state policies were adopted to support collective bargaining. The New Deal Policy acknowledged as public policy the support of collective organizations and bargaining in order to manage escalating tensions in industrial relations. Franklin D. Roosevelt's New Deal labour policy both built on and expanded Herbert Hoover's policy of an "associative state" in which the welfare state provides the background for societal regulation by non-

33) Commons and Andrews 1916: 120.

27) See Taylor 1947 which comprises his main writings: "Shop Management" (1903) and "The Principles of Scientific Management" (1911).

35) Taylor 1947: 115.

36) Tomlins 1985: 93-100.

governmental, associational networks located in the private sector (37).

In a first phase, with the National Recovery Act and the Labour Disputes Bill 1934, the New Deal state policies concentrated on the introduction of mechanisms of labour conflict resolution like conciliation, mediation and arbitration in order to facilitate voluntarist organization and bargaining.

"The solution lay in allowing individuals to organize and bargain collectively without interference, and in creating a tripartite administrative board which would ensure that interference did not take place and which would offer its services as a mediator and arbitrator in those disputes which still occurred." (38)

The National Labour Board (NLB) was created in 1933 as a tripartite administrative body at the federal level. Its main task was to prevent disputes to from developing into strikes by offering mediation. In addition the National Recovery Administration (NRA) implemented economic policies which also aimed at supporting the development of collective bargaining structures. However, this American version of corporatism supported by the NRA met strong opposition. The traditional crafts-oriented AFL, not at ease with organizing mass production workers, opposed the Labour Disputes Bill together with the employers. In particular the concept of collective bargaining pluralism which was purported by the NRA was rejected by the AFL and subsequently by the NLB, which favoured majority rule elections and exclusive representation (39). Indeed the NRA failed to achieve its general goal to "institutionalize a new cooperative relationship between business and labor based on collective bargaining. Instead, it had intensified class conflict." (40)

37) On Hoover's associative state see Tomlins 1985: 91-99.

38) Tomlins 1985: 119.

39) Brand 1988: 242-254.

40) Brand 1988: 257.

Thus, in the second phase, the reform of industrial relations at the governmental level shifted towards strengthening the collective bargaining system. The National Labor Relations Act of 1935 was introduced explicitly to change the status of collective bargaining agreements. These agreements were no longer seen as a concern of the employees and the employers alone but as a concern and an expression of public interest as well. This meant a qualitative shift in public policy towards collective bargaining which intended to give unambiguous public support to independent unionism as a means of promoting collective bargaining. The policy differed from the several legislative attempts of the 1920s, which merely intended to stabilize existing relations between organized parties. It vindicated the tangible public interest in the stabilization of the wages, hours of work and working conditions of the labour force at large. Consequently, the new labour laws supported collective bargaining on a larger scale than companies and argued against company unionism. The new National Labor Relations Board (NLRB) was designed to interfere directly in negotiations to secure appropriate collective bargaining structures.

The new act envisaged a different role for trade unions. They were encouraged to become dependent on the system of collective bargaining. Both unions and employers were asked to support the development of the collective bargaining system. This required a new self-understanding and practice from these organizations. In fact, the instability of the collective bargaining system created uncertainty in the organizations which was directed against the state policies in support of the collective bargaining system.

The NLRB met opposition from employers, unions, politicians and academics who argued for voluntarism and against statutory state intervention. Against this

opposition the NLRB failed to have an impact on the development of collective bargaining as a social system. The agency was widely perceived only to denounce "sins" of employers and to stamp them out. The powerful opposition alliance destroyed the old NLRB and this had a detrimental impact on collective bargaining in the U.S. (41).

The most severe impairment of the NLRB with respect to effective support of collective bargaining was the destruction of its Economic Research Division. The impotence of the NLRB to engage in labour policies and practices in support of collective bargaining was related to its inability to collect and use economic and industrial relations data in its everyday practice. Gross has drastically characterized the NLRB as an institution which by 1947 had been "transformed from an expert administrative agency which played a major role in formulation of labour policy into a conservative, insecure, politically sensitive agency preoccupied with its own survival and reduced to deciding essentially marginal legal issues" (42).

The post-war situation was largely dominated by processes restricting and de-radicalizing the NLRB and the Wagner Act (43) which in fact led to the "privatization of public policy" (44). Legislation stopped with the three major statutes: the Wagner Act of 1935 introducing state support for autonomous collective bargaining, and the limitations of this Act by the Taft-Hartley Act of 1947 and the Landrum-Griffiths Act of 1959 regulating and restricting union power.

There have been a number of attempts to explain the exceptional character of the development of U.S. collective bargaining, labour law and industrial relations in general.

41) See Gross 1981.

42) Gross 1981: 267.

43) Klare 1978.

44) Selznick; Nonet and Vollmer 1969: 229-240.

In Alan Hyde's "theory of labor legislation" the political passivity of American unions is held responsible for the inactivity of the U.S. policy-maker and the lack of legislation. Unlike in Europe the American political elite was not threatened by disruptive worker movements after WW II and thus did not engage in symbolic political concessions to the labour movement.

Other analyses emphasize the broad pluralist consensus in industrial relations and labour law which developed after WW II. This consensus favoured a separate common law of industrial relations which develops formal cooperation in negotiations in unionized companies and in company grievance procedures, and which creates an alternative to state policies and judicial review. The development of sectorial or national collective bargaining was prevented, and large sectors of the American work force that were not unionized were kept outside the domain regulated by the industrial relations system.

Post-war American labour law developed into common law of collective bargaining, which is characterized by the following principles: exclusive representation of the bargaining unit; majority rule; protection against unfair labour practises of the employer against union activities; no judicial review; and final and binding arbitration.

The paradigm of American labour law which is described as "industrial pluralism" is based on the premises of industrial equality at the workplace and neutral arbitration. Katherine Stone criticizes both premises as false descriptions of reality which is actually characterized by inequality at the workplace and important internal and external pressures on arbitration (45). She proposes an alternative concept of labour law which aims at a politicization of industrial relations issues and at a

45) Stone 1981.

"public" form of dispute resolution. Her institutional alternative could be read as a proposal for a labour judiciary in the U.S. (46).

Within the legal discourse the majority of American labour lawyers view the limited amount of regulations still rather as a virtue than an obstacle for the development of industrial relations. Nevertheless, some critical labour lawyers emphasize the weakness of American exceptionalism for the developments of unions, the collective bargaining system and the American industrial relations system in general (47). To overcome particularistic bargaining strategies they argue for an understanding of collective bargaining "as a system of industrial democracy and as a framework for employee self-determination" (48). The goal is democratization of decision-making at the workplace. With respect to the reform of collective bargaining, this approach argues for restrictions on management rights; prerogatives or discretionary decisions should remain outside the ambit of collective bargaining. Thus, it radicalizes previous pluralist views.

Philip Selznick and his collaborators argued already in the 1960s that collective bargaining in fact undermines the doctrine of management prerogative. Although "creative arbitration" does not challenge "the locus of responsibility" within company structures, it inevitably restricts the exercise of management discretion and subjects the exercise of power to dialogue. In their empirically informed perspective, rooted in legal realism, a major effect of the operation of the collective bargaining system was that management has to justify its decisions and thus "give way to policy" (49). Collective bargaining introduces

46) Stone 1981: 1580.

47) See Rogers 1988 and Klare 1988a and 1988b.

48) Klare 1988a: 69-76 (74).

49) Selznick; Nonet and Vollmer 1969: 121-182.

procedures which gradually undermine the basis for authoritarian power relations and management prerogatives.

At the end of the 1980s Klare argues for full recognition within labour law doctrine of the reality which Selznick et al. described more than twenty years ago. In Klare's account the principle of management prerogative should be abandoned within the context of collective bargaining and be replaced by the principle of industrial democracy and employee self-realization.

"There is no reason why collective bargaining and arbitration must assume an inherent managerial prerogative. Law easily could, and in my view should, substitute a different baseline assumption. The norm should be that employees enjoy an inherent or vested right to participation in workplace decision-making. A situation vesting management with exclusive decision-making authority should be the exception requiring special justification as a departure from the basic commitment to democracy in firm governance."
(50)

Katherine Stone's analysis of the role of labour in the corporate structure supports this view. She argues that with the democratization of the corporate structure collective bargaining develops into participation (51). Although she does not seem to be aware of the parallels, her analysis of labor law reflects more general trends in the restructuring of American companies and the American economy. She describes within the regulatory processes of industrial relations a transformation which has been described in economic terms as the transformation from mass production to flexible specialization and as the emergence of a new economy of craft communities (52). Production patterns which pay attention to flexible specialization require new forms of work organization. Developments such as quality circles and other forms of decentralized, semi-autonomous production have an impact on corporate decision-making which

50) Klare 1988b: 51.

51) Stone 1988.

52) Piore and Sabel 1984.

opens up new forms of worker participation and new directions for collective bargaining at the company level.

To summarize, the development of collective bargaining in the U.S. has been challenged by significant changes in labour markets and technology. However, American labour law is still centered around principles of voluntary regulation through collective bargaining and decentralization in the establishment of grievance arbitration. The rapid decline of unionism (53) is accompanied by new human resource management strategies. These alternatives to traditional collective bargaining in the form of consultation procedures and non-union company grievance procedures are structural innovations in the U.S. collective bargaining and industrial relations system. American labour law will have to take notice of these challenges which undermine traditional industrial relations and collective bargaining.

Germany

The development of collective bargaining in Germany started in the nineteenth century mainly in two industrial sectors, printing and construction. For a long period the development of collective bargaining showed a strong disparity among German industrial sectors. Whereas the major industries with mass production and large corporations remained opposed to collective bargaining with independent trade unions, it developed in sectors characterized by competition between small and medium-sized companies.

The printing industry was the first industry to adopt a national collective bargaining agreement in 1873. It was also the industry which developed the most elaborate structure of collective bargaining.

53) Freeman and Medoff 1984 and Kochan et al. 1986.

The employer association (Buchdruckerverein) recognized the trade union (Buchdruckerverband) after a number of local strikes and short imprisonment of the union leader for "defamation" because he had publicly announced his intention not to accept the employers' conditions (54). The collective agreement was the product of negotiations in a joint committee with an equal number of elected members from both sides. The agreement included detailed regulation of wages. However, the implementation of the national agreement was not successful in all regions. The trade union lost credibility among parts of its membership in the important district of Berlin and a significant drop in membership occurred. The revolutionary wing of the labour movement accused the printers' union of reformism. The local unions and some employers asked for revision of the collective agreement, which led to a new round of negotiations in 1876. The two major results of the new collective agreement were that union members were entitled to fixed wages which no employer of the printing industry was allowed to undercut. And the collective agreement included a detailed arbitration procedure (Schieds- und Schlichtungsordnung) which formed an essential and characteristic part of the collective agreement (55). The collective bargaining system was almost destroyed in the 1890s when the unions started strikes in order to widen the bargaining issues from wages to working time, which met almost unanimous employer resistance.

By the turn of the century the printing industry had not only adopted comprehensive regulations of wages, hours of work and overtime through collective agreements. Collective bargaining also included separate regulations on peace obligations, arbitration procedures and joint committees. It is significant from a system theory perspective on the German system of collective bargaining that the printing industry had a so-called "organization agreement" in which the collective bargaining partners mutually recognized each other. This agreement was in fact a closed shop agreement because the employers were only allowed to employ union members and union members were only allowed to work for employers who belonged to the association of printing employers. Trade unions and employer associations strengthened their organizations through collective bargaining.

The construction industry was the second most active industrial sector to develop a collective bargaining system. Collective bargaining was characterized by local agreements and only a few regional agreements. The number of collective bargaining agreements increased between 1890 and

54) Burkhardt 1974: 24-25.

55) See Burkhardt 1974: 29-32.

1910 from 26 to 2437 (56). Although dominated by local collective bargaining, there was a movement towards national agreements which led to a national agreement in 1910.

However, the large industries in mining, steel and textile remained hostile towards collective bargaining. The large corporations in these industries, which were engaged in developing mass-production before WW I, wanted to remain in control of restructuring their work organization. Whereas employers in printing and construction used collective bargaining to reduce competition among themselves, this was of minor concern for the cartellized large industries.

Trade unions were not very successful in organizing unskilled employees in these industries. Furthermore, they were against collective bargaining for ideological reasons. Lasalle's verdict against unions engaging in wage conflicts, which he thought only created false hopes that the working class would be able to raise its living situation above the level of subsistence, prevailed over Marxist ideas of the transformative potential of union involvement in collective bargaining in order to question the wage system as such (57). The union position changed in 1899, when the General Convention of the German unions accepted collective bargaining as a means for unions to achieve recognition and an equal status with employer associations (58).

56) Ullmann 1977: 218-222.

57) See Hagemeier et al. 1984: 48.

58) "Tarifliche Vereinbarungen, welche die Lohn- und Arbeitsbedingungen für eine bestimmte Zeit regeln, sind als Beweis der Anerkennung der Gleichberechtigung der Arbeiter seitens der Unternehmer bei Festsetzung der Arbeitsbedingungen zu erachten und in den Berufen erstrebenswert, in welchen sowohl eine starke Organization der Unternehmer wie auch der Arbeiter vorhanden ist, welche eine Gewähr für Aufrechterhaltung und Durchführung des Vereinbarten bieten". See the documentation of the 1899 resolution in Blanke et al. 1975, Vol. I, p. 128.

Nevertheless by 1906 there existed more than 3.000 collective bargaining agreements which rose to 13.000 agreements in 1913 (59). And a new understanding of the legal status of collective bargaining agreements led to the development of a "scientific community" of labour lawyers in the academic world (60).

The situation changed during WW I. The War Ministry introduced a law in 1916 (Vaterländisches Hilfsdienstgesetz of 5 December 1916) which officially recognized the unions as representatives of the "national will" of German employees. Collective bargaining between the unions and the employer associations became the preferred method of regulation of industrial relations for the state and the judicial system (61). The 1916 law also introduced arbitration committees which consisted of an equal number of representatives of unions and employers.

Immediately after WW I a top agreement between the federations of the unions and employers' associations was reached (Stinnes-Legien-Abkommen creating the so-called Central Working Group, Zentralarbeitsgemeinschaft). The agreement represented a corporatist arrangement at the national level. The employers favoured it as an instrument for developing an arbitration system independent of state regulation which could depoliticize the unions and reduce their role with respect to economic decision-making (62). The law on collective bargaining from 23 December 1918 (Verordnung über Tarifverträge, Arbeiter- und Angestelltenausschüsse und Schlichtung von Arbeitsstreitigkeiten) introduced legally binding collective

59) See Hagemeyer et al. 1984: 49-50.

60) Dubischar 1990.

61) The Reichsgericht, in its decision of 20 January 1910, only endorsed collective agreements as legally binding contracts in order to create a legal basis for tort claims against the unions. See RGZ 73, p. 99 and the interpretation in Hagemeyer et al. 1984: 50-51. See also Blanke et al. 1975, Vol. I, pp. 129-130.

62) See Berg 1975: 41-42.

agreements, arbitration procedures and works councils. By 1922 about 15 million employees were covered by collective agreements, compared with only two million employees in 1913 (63).

A significant development for German collective bargaining was the radicalization of shop floor industrial relations at the end of WW I and the beginning of the Weimar Republic. The trade unions were largely unable to incorporate the radical representatives of shop floor unionism. The lack of reform of the traditional unions contributed to the development of an independent socialist works council movement. This movement created the background for the introduction of the so-called legislation on the company constitution (64). The Works Council Act (Betriebsrätegesetz) of 1920 introduced worker representation at the company or plant level initially as a second negotiation system in order "to control production". The elected representatives were supposed to operate within the so-called company constitution, formally independent of the trade unions, which controlled industry-wide collective bargaining. After initial radicalization the works councils were depoliticized due to massive resentment from official trade unions. The tasks of works councils were reduced to representing employees and to participating in internal company affairs unrelated to decision-making on production (65).

During the 1920s the influence of the state on collective bargaining increased. The law on arbitration of 23 October 1923 (Verordnung über das Schlichtungswesen) introduced official arbitration to "assist collective bargaining". However, the state could impose an arbitration award. This situation led to an arbitration system which

63) See Adamy and Steffen 1985: 216.

64) See von Oertzen 1963: 153-169.

65) See von Oertzen 1963: 195 and 247-270 on the arguments of the official unions against workers councils.

was used by the state at the end of the 1920s and the beginning of the 1930s to implement authoritarian economic policies (66).

With the development of collective bargaining and state regulation of collective bargaining in the Weimar Republic, a collateral discussion led to the enactment of arbitration law. The state was able to impose arbitration awards on the collective parties in dispute. Thus, it was not the collective bargaining system through self-regulation but state legislation which forced arbitration and collective bargaining. This legislation has to be interpreted as part of the unsuccessful attempt to create a unified labour law (67). State arbitration was ultimately guided by the intention to fight strikes and not to create an autonomous collective bargaining system. The main instrument of state intervention became the declaration of extension of arbitration awards which one or both parties had rejected (Verbindlicherklärung).

The Nazis abolished collective bargaining and replaced it by wage orders issued and implemented by so-called labour trustees (Treuhänder der Arbeit) (68). After WW II collective bargaining was given "autonomy" in the collective bargaining act of 9 April 1949 (Tarifvertragsgesetz revised on 25 August 1969). The collective bargaining act defines the scope, the form and the parties of a collective bargaining agreement. In addition, it contains regulations on the duty of the collective bargaining parties to register their agreement with the Federal Ministry of Labour. The most important regulation of this act concerns the extension of collective bargaining agreements which can be granted by either the Federal or a State Minister of Labour after

66) Berg 1975: 90.

67) Bohle 1990: 59-84.

68) See Körner 1937. See also Kranig 1983 and Mayer-Maly 1989.

consultation with the committee comprised of union and employer representatives.

Collective bargaining stabilized its autonomy after WW II by adopting its own arbitration system. German "interest" procedures, which structure negotiations on the renewal of a collective bargaining agreement, were distinguished and separately regulated as negotiation procedures and arbitration procedures. Special collective bargaining agreements established arbitration procedures which are applicable in case of conflict or stalemate of negotiations. These arbitration procedures were agreed upon by the peak organizations DGB and BDA in the early 1950s to avoid statutory legislation and external intervention by the state. In 1950 (Hattenheim) and 1954 (Margarethenhof) these organizations agreed on a "Mustervereinbarung für eine tarifliche Schlichtungsordnung" which all major collective bargaining associations (Tarifverbände) adopted subsequently. Arbitration agreements have a different duration from collective agreements, which regulate wages and working conditions.

The law has recognized self-regulation of collective bargaining matters. It distinguishes between interest conflicts (Regelungsstreitigkeiten) and rights conflicts (Rechtsstreitigkeiten). Only the second category can be handled in court.

Collective bargaining developed in Germany in a situation of relatively high legalization of industrial relations. Co-determination of company owners and employee representatives in mining and steel companies was already introduced by a statute at the beginning of the 1950s. The Co-determination Act (Mitbestimmungsgesetz) of 4 May 1976 introduced co-determination schemes for supervisory boards of companies with more than 2000 employees. An equal number of shareholder representatives and elected employee representatives supervise management, i.e., the board of

directors. However, there is no full parity between employees and owners, because middle management (Leitende Angestellte) is granted a seat on the bench of the employee representatives. The unions therefore deny that the scheme constitutes full co-determination.

There were remarkable tendencies to establish collective bargaining at the macro-level of German politics. The German state experienced tripartite cooperations of the peak organizations and the government at national level. At the end of the 1960s and the beginning of the 1970s the so-called Concerted Action organized regular meetings to discuss issues of income politics. The macro-corporatist experiences of the German state were thus adopted to instrumentalize collective bargaining mechanisms in order to formulate and to implement economic policies (69). The unions refused in 1976 to continue to participate in this action after a legal attack of the employers on the Co-determination Act of 1976 (70).

Complementary to macro-corporatist experiments, there has been a significant development in German collective bargaining towards decentralization of wage bargaining. Regional, industry-wide or national collective bargaining over wages establishes only the basis for more detailed regulation of wages at the company level (71). Real wages are no longer determined by national collective bargaining but rather by company agreements. To the extent, however, that industry collective bargaining has lost its influence on the development of real wages, it has gained influence regulating working conditions. A dominant issue of industry-wide negotiations in the 1980s were debates about reduction of hours of work, but also comprehensive programs to "humanize" the place of work. Wage bargaining at the supra-company level is nevertheless used by the

69) See von Beyme 1985: 116.

70) See also Weiss 1986: 31.

71) See only Buchner 1990 and Däubler 1990a: 154-172.

participating organizations to demonstrate the success of policies. In 1989 there existed about 40.000 collective bargaining agreements in Germany (72). About 90 per cent of all employees are covered by collective bargaining agreements (73).

It is a remarkable sign of the success of the German collective bargaining system that it was never necessary to invoke the Law on Minimum Wages and Working Conditions because there was never a situation of insufficient regulation through autonomous collective bargaining. The German industrial relations system in general and the collective bargaining system in particular have been challenged during the recent processes following the unification of the two Germanies. The collective bargaining system plays an active role in the economic restructuring of the new East German states. The President of the Federation of German Employer Associations defended the system of autonomous collective bargaining in highlighting its performance during the restructuring processes of the East German economy. His characterization of the advantages of industry-wide collective bargaining can also inform about the actual practice of collective bargaining in Germany (74). His arguments can be summarized as follows:

1. Industry-wide collective bargaining and plant bargaining. The fact that individual employers and unions in the depressed industrial regions of East Germany negotiate lower wages at the shop floor or company level secures the system of collective bargaining in general. Fragmented collective bargaining would have negative impacts on the autonomy of collective bargaining. Permanent wage discussions at the company level would undermine social peace.

2. Collective bargaining and the restructuring of companies. Although wages which undercut the minimum level established

72) See Meier-Krenz 1989: 6.

73) See Kittner 1987: 1012.

74) Interview with Dr. Klaus Murmann, President of the Bundesverband der deutschen Arbeitgeberverbände, BDA, in die tageszeitung, 17.8.91, p. 5.

by industry-wide collective bargaining could increase the survival rate of some companies, they would have a detrimental impact on the modernization of companies. Industry-wide wages force companies to modernize their capital basis and to change production patterns to become able to produce marketable goods.

3. Collective bargaining and wage regulations. Industry-wide autonomous collective bargaining is an integral part of the division of labour between the state, the companies and the system of collective bargaining in regulating wages and working conditions. Both the companies and the state have delegated the solution of distribution conflicts to the collective bargaining system and thus have relieved themselves of the need to decide on the distribution of economic surpluses. Companies would be overburdened with the task of settling wage conflicts. They would increase their risk of insolvency.

4. Collective bargaining and skilled workers. The results of industry-wide collective bargaining are stable and relatively high wages for a foreseeable period of time. Stable wages motivate qualified, skilled employees to stay in the Eastern regions where they are desperately needed in the restructuring process.

5. Macro-economic concerns and general social values in collective negotiations. In industry-wide negotiations which were conducted shortly after unification, solidarity given the strain on the economic development in general, concerns for social peace in the East and the prevention of massive migration from East to West played a prominent role in collective bargaining. Nevertheless, the instability of economic development was recognized in the recent collective bargaining agreements as well. Collective bargaining agreements have become more flexible through so-called revision clauses which were introduced to enable early negotiations before the agreed end of the term of the agreement.

In the future, German collective bargaining will have to deal with concession bargaining to manage the economic and social challenges of unification. There are discussions in the union movement to create a "solidarity fund" into which one per cent of the annual wage increases achieved through collective bargaining should be paid (75). In addition, collective bargaining will have to deal with increased decentralization. The system will have to strike a new balance in the division of tasks between meso- and

75) See Bispinck 1991: 124-129.

micro-levels of bargaining. And in order to protect its autonomy it will have to find mechanisms to refrain from including topics which are beyond the scope of its regulatory capacities. The system can only perform economic and social policy goals when its autopoiesis is not threatened.

France

Collective bargaining in France is comparatively underdeveloped. Although unions were already decriminalized by the Law of 25 May 1864, when the felony of conspiracy was eliminated, and subsequently legalized by the Law of 21 March 1884, collective bargaining did not develop as a system in the first half of the 20th century. Piore and Sabel argue that the non-cooperation of the French employers and unions was not only a result of managements' reprisals against union followers but, in fact, due to "the continuing influence of the Proudhomist tradition of craft mutualism, in which not the plant but the regional community of skilled workers was the locus of organization" (76). The local character of the French economy and, indeed, French industrial relations is an outstanding phenomenon which not only characterizes the institutions of labour market regulation (a further example are the Bourses du travail (77)) but also the development of French labour courts until the end of the 1970s.

The core issue of collective bargaining, wage regulation, was determined by state policies. After WW II the French state raised the minimum wage which was explicitly indexed to the cost of living after 1952. And the strategy of the government was to centralize the

76) Piore and Sabel 1984: 137.

77) Schöttler 1981.

determination of wages through pattern-setting contracts in state-owned firms. Collective bargaining was reduced to implementation of these agreements in the non-governmental sector. The state developed a policy of extension of collective bargaining agreements to other firms of the same industry which did not formally participate in collective bargaining.

The Law of 24 June 1936, based on the Matignon agreement, made collective agreements normal means of establishing conditions of employment. The Law of 11 February 1950, modified by the Law of 13 July 1971, gave collective bargaining a new legal framework. However, only in the 1980s were there attempts to reform the collective bargaining system. The Auroux Law of 13 November 1982 boosted collective bargaining by introducing the duty to bargain on the part of the employer. The law prescribed that employers and unions have to meet at least once every year to negotiate over wages and working time. These negotiations have to be carried out at the company level and not at the plant level.

A particular concern in French labour law and, indeed, in French law in general is the so called ordre public. Collective bargaining agreements cannot regulate issues which are declared part of this public order. This principle is now incorporated in the Code du travail (L. 132-4). French labour courts, for example, cannot be established by collective bargaining agreements (78).

French collective bargaining agreements can be either enlarged or extended (79). The Law of 11 February 1950 only permitted an extension if all involved unions had agreed to the procedure. Extension is granted by the Minister of Employment after consultation with the National Commission of Collective Negotiation. After an extension is granted,

78) See Despax and ofot 1987: 245-247.

79) See Despax 1989: 463-516.

the normative provisions bind all employers and employees within the scope of the agreement or 'branch of activity' referred to by the parties. The extension might be withdrawn. The Ministry of Labour reported that by the end of 1982 there were 1118 collective bargaining agreements registered of which about a third were extended (80). French labour law is remarkable insofar as it is largely codified. Since 1910 the Code du Travail has gradually been enlarged. It was reformed by the Law of 2 January 1973 and now contains 9 books. The law of collective bargaining (Conventions et accord collectives de travail) is contained in Title III of Book One L. 131-1 to L. 137-1, R. 132-1 to R. 136-11).

The history of state regulation of conflict resolution in collective labour law shows more concern with suppressing strikes than enhancing collective bargaining. The Law of 1 December 1936 imposed an obligatory arbitration procedure on the parties before they were allowed to strike or to lock out. The Law of 11 February 1950 kept the obligatory arbitration provisions only formally and abolished the requirement of an arbitration procedure before a strike can take place. The Law of 13 November 1982 modified the obligatory provisions and expressed a clear preference for negotiations.

French procedures for collective or interest conflicts are separately regulated by statute in Title II of Book Five of the Code du Travail (L. 521-1 to L. 526-1, R. 523-1 to R. 525-18). Three main procedures are mentioned in French labour law: obligatory conciliation, mediation and facultative arbitration (arbitrage). Conciliation is carried out by a tripartite commission located at the regional or national level. Mediation is carried out after conciliation has failed; the proposal of the mediator is not binding. Facultative arbitration is only binding if the

80) Despax and Rojot 1987: 275-276.

parties have agreed upon it beforehand either in the collective bargaining agreement or in a separate agreement (81).

Interest conflicts are referred to as "economic" conflicts. Similar to German law, the French law of collective labour conflict resolution distinguishes between interest and rights conflicts; only the latter category can be handled in court. The traditional ideological preference for state intervention over voluntary conflict resolution has been abolished by the Law of 13 November 1982 which explicitly endorses the idea of negotiations to deescalate tensions. State interventions in collective labour conflicts have always been rather ineffective (82). Finally, as in other countries, direct negotiations are also in France the prevalent mode of settlement of interest conflicts and not state intervention (83).

Functions, Performances and Reflexions of Collective Bargaining Systems

Sociologists are used to analyze industrial relations in the wider context of the study of society. In an autopoietic view of society functions of social systems are not fixed at the level of society but each system develops its own view of its functions within society. The view of society on the function of a social system can differ from the system's own view of its function. In this case adjustment processes must occur. For society the function of industrial relations is often the prevention of collective violence. Collective bargaining is supposed to

81) See Thillet and Bennechère 1990:, Rdnr. 30.60-19 to 23.

82) See the figures on declining use of collective procedures in Blanc-Jouvan 1971: 59 and Table 2 and Javillier 1981: 596-7 and 1990.

83) See Javillier 1990: 428.

channel conflictual issues into negotiations between the collective parties. However, collective violence has a different meaning within the communicative processes of the industrial relations system. In fact, prevention of violence as such is not seen as the main function of the system. Rather violence is considered an integral part of industrial action and the threat to engage in violent actions is often seen as a necessary tool in negotiations.

The literature on industrial relations discusses a number of heterogeneous functions of collective bargaining. These include regulation of wages and working conditions, employment protection, distribution of gains from economic growth, participation in economic decision-making, reduction and control of company competition over working conditions and legitimation of social and economic state policies (84).

The classical literature, in particular the Webbs (85), discusses collective bargaining as the problem of trade unions and industrial democracy. In their view collective bargaining is intricately related to trade unions and is thus studied as a means to strengthen trade unions. Collective bargaining is one among other trade union functions. Although collective bargaining "extends over a much larger part of the industrial field than Trade Unionism" it is the trade unions alone which guarantee the application or extension of collective bargaining over the district or the nation (86). Their organizational or behaviouristic approach to collective bargaining as part of the development of trade unions has dominated the study of industrial relations.

In the industrial relations approaches collective bargaining is traditionally analyzed in behaviouristic terms

84) See only Flanders 1970: 155-276 and Chamberlain and Kuhn 1983.

85) Webb 1920a and 1920b.

86) Webb 1920b: 178-9.

as a problem of collective action. Its topics are the development of trade unions, strike activities, and state interference and control of collective action (87). Indeed the origins of collective bargaining systems are intricately linked to the development of collective organizations of workers and their concerted activities. However, the behaviouristic approach becomes limited, if the transformation of unions into bargaining agents is to be described. The focus of analysis has to shift to the collective bargaining system and its autonomy in order to understand the repercussions of this system on the organizations of workers.

There are several ways to classify the functions of collective bargaining systems. Functions can be distinguished with respect to the participants in collective bargaining and with respect to external relations to society. However, in applying a systems theoretical understanding of function, the function expresses the special contribution of industrial relations and the collective bargaining system to the society at large. Thus, insofar as relations of two systems like the industrial relations system and the economic system are concerned, this is best described as a relationship of performance and not of functions. Self-reference of the collective bargaining system to its own communications should be distinguished both from its functions and its performances. Processes of self-reference can be called reflexions.

In applying this threefold distinction it becomes possible to see that the Oxford school of industrial relations has based its conception of industrial relations implicitly on notions of reflexion of the collective bargaining system. The theory of collective bargaining as

87) See for example Webb 1920a; Clegg et al. 1977; Clegg 1985. This holds equally true for the history of labour law. See Kahn-Freund 1983, ch.3; Wedderburn 1986: 270-309.

the core of the theory of industrial relations was developed by Alan Flanders (88). He criticizes the Webbs for reducing the discussion of collective bargaining to traditional industrial relations research, in particular the economic aspects, thus overlooking the non-economic consequences of collective bargaining. Flanders states the following shortcomings of a purely economic view of collective bargaining which "tells us too little about the institution it claims to describe" (89):

"Because the Webbs treated collective bargaining as an economic process, ... they tended to overlook, as others have done who followed in their footsteps, all of its non-economic aspects. This applies firstly to its overall social consequences and achievements and therefore to its evaluation; secondly, to the forces influencing the conduct of negotiations and consequently their outcome; and thirdly, to the range and type of industrial conflict which the institution may be called upon to resolve."

Flanders' three shortcomings of "the classical or traditional theory of the nature of collective bargaining" can be reconstructed in an autopoietic view as the three aspects of function ("overall social consequences"), reflexion ("forces influencing the conduct of negotiations") and performance ("conflict resolution"). Indeed Flanders develops an understanding of collective bargaining and industrial relations as an autonomous system.

For Flanders collective bargaining is characterized by its job-control function. Collective bargaining is conceived as a source of law and rules which regulate jobs in a joint fashion. The function, of joint regulation of jobs indicates the essential character of the modern concept of collective bargaining (90).

88) Flanders was the leading representative of the 'Oxford School' of industrial relations which supported academically voluntarist labour policies against state intervention in collective 'laissez-faire' relations.

89) Flanders 1968: 223-224.

90) Flanders 1968: 213-226.

Flanders' deserves credit for his rigorous insistence on the social origins of the collective bargaining system independent of unilateral regulation of trade unions. He argues convincingly that collective bargaining "had its origins in alternative methods of job regulation" characterized by joint rather than unilateral regulation of jobs (91). Joint job control as the origin of collective bargaining has the potential to offer management an alternative to unilateral decision-making when it is integrated in the decision-making on economic issues in modern companies. Thus it is the reflexion on the core of the industrial relations system, i.e., collective communications, which enables the system to flourish and to become attractive for other systems.

Neil Chamberlain and James Kuhn (92) have distinguished three concepts of collective bargaining which also represent three stages in the development of a collective bargaining system: (a) the "marketing theory" viewing collective bargaining as a means of contracting for the sale of labour; (b) the "governmental theory" viewing collective bargaining as a form of industrial government, and (c) the "managerial theory" viewing collective bargaining as a method of management (93). The historical development is accordingly characterized first by early negotiations fixing terms for the sale of labour; the agreements consist of no more than standard piecework price lists. The second stage introduces procedures for settling disputes. The third stage is characterized by negotiations and agreements over subjects that entered into internal decision-taking processes of a business enterprise.

The historical stage model can be reconstructed in a systems theoretical view which uses a differentiation

91) Flanders 1968: 223.

92) Chamberlain and Kuhn 1983.

93) See also the discussion of the three theories of collective bargaining in Flanders 1970: 230-236.

concept. The first stage is characterized by the attempt of the industrial relations systems to differentiate itself from the economic system. In the second stage the industrial relations system is governed by the state through direct interference in case of conflict; it has to achieve independence from the political system by developing its own structure through self-regulation resulting in joint procedures and institutions for conflict resolution. And the third stage indicates the possibilities of structural interference and the performance aspect of industrial relations with respect to other systems and in particular the economic system, once the industrial relations system is secured and no longer fundamentally threatened in its autopoiesis. In addition, it indicates the vitality and attractiveness of decision-making in collective bargaining for the reform of company decision-making in general. Indeed, industrial democracy based on strong autonomy of collective bargaining can be seen as a functional equivalent in management strategies of corporations.

In analyzing the relations of the industrial relations system to other social systems it is useful to distinguish the performances and reflexions of the industrial relations system. The collective bargaining system performs for the economic system a stabilization of wage conditions and reduces competition between companies. It creates the frame for long term planning and rational decision-making within companies with respect to financial and production matters. It affects the labour market composition, the mobility of the work force and career planning of skilled workers.

The collective bargaining system can fulfill its functions and achieve its performances for other systems mainly through reflexion on internal mechanisms which stabilize its autonomy. The industrial relations system reflects on its performances for other functional subsystems and the structural coupling to the economic and the

political system. However, it becomes increasingly able to evaluate the dangers which arise from intersystemic relations. And the awareness of dangers is translated into developing control mechanisms which are compatible with the communication structure of the industrial relations system. Thus reflexion is guided by concerns for the self-reference and autopoiesis of the system. The introduction of adjustment procedures, i.e., "revision clauses", can be interpreted as a reflexion of the German collective bargaining system on its structural couplings to processes within the economic system. "Revision clauses" are attempts to flexibilize the structure of the system through further differentiation of procedures compatible with the communicative structure of collective negotiations.

Most collective bargaining laws stipulate that the collective agreement contain a peace obligation as part of the obligatory part of the collective bargaining agreement. The justification for the peace obligation was used to argue that the collective bargaining agreement has an "ordering function" within industrial relations; a peace obligation is therefore considered an intricate part of the very idea of obligatory collective bargaining agreements between the collective parties (94). From the societal point of view it is this mechanism of the peace obligation which fulfills society's functional ascription to the industrial relations system. This function relates to the management of collective violence in order to prevent the interruption of communications and interactions of other parts of society. It also raises the threshold for collective actors to engage in violent collective action unless it can also be justified as a concern for the society at large.

94) See Aubert 1981: 10-11 on the origins and early debates of the legal nature of the peace obligation.

The Autonomy of Collective Bargaining

The autonomy of collective bargaining means that the cartel of collective bargaining parties is able to determine the content of collective agreements. The Autonomy of collective bargaining is thereby usually understood in organizational terms to mean the independence of collective bargaining from interference by the state as well as by groups of employees or single employers (95). In Germany the principle of the autonomy of wage negotiations (Tarifautonomie) is generally used to refer to collective bargaining. Indeed, this term, i.e., Tarifautonomie, has become a synonym to refer to the system of collective bargaining (96).

It has been rightly observed that the different terms to refer to collective bargaining in the Anglo-American world and the German-speaking world indicate different approaches. Whereas Anglo-American collective bargaining emphasizes the process character, the German concept emphasizes the independence from state regulation and its nature as a separate source of law. The Anglo-American concept of collective bargaining is influenced by social science thinking, whereas the German concept of Tarifautonomie has labour law origins (97).

From a political or legal perspective, i.e. from the perspective of the political or legal system, collective bargaining is seen as only relatively autonomous. The state remains in control of procedures and provides laws to regulate the procedural structures.

Marxist accounts of industrial relations have developed a concept of the autonomy of industrial relations which

95) See for example Külp 1977: 1.

96) See for example Weitbrecht 1969.

97) See Müller-Jentsch 1983: 118.

delineates itself both from pluralist and from systems theoretical notions of autonomy. Richard Hyman, for example, insists that industrial relations are located only at "a level of social relations which partially follow their own (contradictory) laws of development" (98). Because of the dual emphasis of Marx on structuralist ("structural determinacy of capitalist production") and behaviouristic ("working class struggle") facets, the analysis of the autonomy of industrial relations should not be exaggerated. However, Hyman confuses system references. His discussion of the relative autonomy of industrial relations refers to the state policy of abstentionism, which he interpretes as a different form of state involvement (99). His "political economy of industrial relations" argues from the perspective of the political system which certainly has granted industrial relations only relative autonomy.

From an autopoietic perspective which separates system references and thus is able to argue from within the industrial relations system, state regulations are only conditions for the internal creation of structures which guarantee self-reproduction of the industrial relations system. Autonomy is thus related to autopoiesis.

If we define the industrial relations system as autonomous because of its autopoietic nature, this has an impact on the definition of the role of collective bargaining agents. They become dependent on the circuit of decision-making. And this leads to intraorganisational repercussions. The theory of unions as agents of their members loses its validity. Unions are increasingly defined by their involvement in collective bargaining. They are no longer merely "pressure groups" or "bargaining agents" but interest representatives within negotiation systems. And the autonomy of these negotiations contributes to the split

98) Hyman 1989: 138.

99) Hyman 1989: 133.

between member interests and the interests of the officials who take actively part in negotiations. The unions' real leaders are their bargaining experts.

Already in late 19th century Britain, the Webbs analyzed a gradual transfer of duties from the "amateur negotiator" or "the non-commissioned officer" to the "salaried civil service" of the powerful collective bargaining participants (100). In the Webbs' account, routinization and institutionalization of bargaining agents within the trade unions characterized the development of the trade unions and collective bargaining.

From a systems theoretical perspective the shift within the supporting organizations indicates the autonomisation of the system of collective bargaining. The system of collective bargaining becomes autonomous through negotiation experts who reinforce the collective communications underlying conditions and structures established by previous collective bargaining. In 19th century England the great staple industries of cotton, coal and iron, together with boot and shoe-making and the hosiery and lace traders developed elaborate organizations for collective bargaining. Bargaining agents became members of two organizations and had to combine their two roles which often contradicted each other.

The stabilization of collective bargaining occurs with the distinction of creating a new collective bargaining agreement and interpreting the terms of an existing collective bargaining agreement. The creation of a new collective bargaining agreement was open for compromise, conciliation and balancing of expediencies. The Webbs' ideal for interpreting a collective agreement was a "peripatetic calculating-machine, endowed with a high degree of technical knowledge, which could accurately register all

100) Webb 1920b: 182.

the factors concerned, and unerringly print out the arithmetical result" (101). This ideal contrasts widely with reality in which grievance procedures and arbitration are nearer to a judicial model with interpretive discretion of general clauses than to routinized administration.

However, the most important strategy of autonomization from our systems theoretical perspective occurs with respect to collective communications. The bargaining parties develop an understanding that it is essential "to preserve the continuity of their relationship" (102). When collective bargaining is conducted with reference to the term that can permanently be exacted, and not only with reference to temporary bargaining advantages, we discover processes of self-reference. When collective bargaining becomes self-referential, its autonomy reaches a new quality. In fact, the self-reference creates the basis for autopoiesis.

Alan Flanders has sensed the autopoiesis of industrial relations in his insistence on the characterization of collective bargaining as a separate system of joint regulation independent of the economic system. Against the background of the most advanced "voluntarist" system of collective bargaining in Great Britain, he was able to understand the autonomy aspects of an advanced system of collective negotiations.

On the surface, an alternative to the British approach of separating autonomous function systems appears to be the German case of mutual interference of function systems. However, this interference must be understood as a sign of mutual recognition of autonomy. The German collective bargaining system has achieved a degree of autonomy which enables it to move beyond mere safe-guarding of the existence of independent bargaining. It has become so

101) Webb 1920b: 184.

102) Flanders 1968: 226-227.

strong that other functional subsystems, in particular the political and the economic system, can instrumentalize the industrial relations system in order to perform their own tasks. The threats to the existence of an independent collective bargaining system have been replaced by its instrumentalization and by a shared understanding of its advantageous impact on economic policies in general. In fact, the system is now more threatened by internal disagreement than by external repression (103).

Industrial Relations and Procedures

Various mechanisms to achieve and to stabilize autonomous collective bargaining have been developed. The most important mechanism is the use of procedures. Proceduralization of collective bargaining usually starts historically with procedures which aim at the management of conflict in situations in which a new collective bargaining agreement has to be concluded or an existing collective bargaining agreement has to be renewed or interpreted. However, most industrial relations and labour law descriptions of collective bargaining concentrate on arbitration procedures.

A sociologist of law emphasizes the different system perspectives of the legal and the industrial relations system on procedural arrangements. Whereas the lawyer analyzes procedures as analogous and compatible with legal and judicial procedures, the industrial relationist is mainly interested in their protective function in securing

103) A good example for destructive internal disagreements was the conflict over the Co-determination Act 1976, which led to the seizure of national tripartite corporatism because of a dispute between the peak associations of labour and employers but not because of hostility on the part of the state.

the autopoiesis of the industrial relation system. Thus control over the procedure, even in case of breakdown of the normal procedure, is vital to maintaining the autonomy of the system.

Three types of procedure have to be distinguished: negotiation procedures to reach collective agreements; arbitration procedures to settle conflicts between the collective actors; and grievance procedures to handle individual complaints at the company level.

Negotiation Procedures

Negotiation procedures are characterized by a double nature, being both internal structures of the industrial relations system and legal institutions governing industrial relations by reference to an external system, i.e., law. The meaning of negotiations or conflict resolution in industrial relations and in the legal system is completely different. The two systems perceive processes and structures (procedures) of negotiation and labour conflict resolution according to their own criteria. Attempts to regulate industrial procedures are thus judged using different codes. However, their elements can be linked structurally. In fact, they need a specific mechanism to cope with structural coupling. The preferred mechanism is the use of procedure and procedural norms both to link communicatively with other systems and to structure the industrial relations system.

In emphasizing procedures, the industrial relations literature has developed a number of insights into the self-regulation of the system. Indeed, the industrial relations systems need procedures for their self-regulation. Without the possibility of procedure no negotiation would be

possible. Procedures are the condition of the industrial relations system to structure collective communications. Furthermore, through the use of procedures the system can establish a "memory" which enables the system to refer to previous events and their outcomes, i.e., previous collective bargaining and their results in the form of collective bargaining agreements.

British collective bargaining introduced at an early stage the distinction of negotiations between the collective parties to reach a collective bargaining agreement and the processes surrounding the interpretation of an agreement. The distinction was used to argue for a separate procedure replacing the "Joint Committees". Whereas the creation of new agreements or their reformulation was left with the joint committees, the application of the agreements was delegated to salaried professional experts, who proved to be more efficient. Already in the nineteenth century the system of collective bargaining developed into an organization with salaried experts who were able to "memorize" rules and procedures and shape them in daily interpretations (104).

Characteristic of the early phases of collective bargaining in England was that the procedure of collective bargaining developed after Boards of Conciliation and Arbitration had been institutionalized. Collective bargaining caused unions to engage in argumentative communication showing an understanding for the other side. Collective bargaining institutions became institutions of separate training of formalized negotiations and reduction of immediate confrontation. Unionists had to learn to argue in economic terms and capitalists had to recognize union leaders as bargaining partners. The role of a bargaining representative was created. For unions this meant that they

104) Webb 1920b: 182-206.

became mediators between members and entrepreneurs and were thus transformed into bureaucracies (105).

A number of industrial relations experts have studied the impact of collective bargaining on the functions of unions. Flanders emphasizes the impact on hierarchy and the increasing necessity for leadership within British trade unions (106). Weitbrecht stresses the mutual relations of collective bargaining and processes inside the participating organizations (107). The negotiation leaders are in a permanent role conflict, which derives from their double position within the collective bargaining system and the union or employers' association. These negotiation leaders have to become independent for structural reasons (108).

These studies can be read as descriptions of adjustment processes of trade unions to the autonomization of the collective bargaining system. Unions have to define their function within the system of collective negotiations. In fact, they have to become part of the structure of collective bargaining and have to defend its autonomy against interference from the political, the legal and even the economic system. The fate of unions becomes dependent on the success of collective bargaining.

If unions want to be recognized, they have to transform themselves from proletarian organizations which pursue goals solely determined by their members into organizations of interest representation which perform collective bargaining tasks. There is an interesting parallel between the political and the industrial relations system. Like political parties in representational democracies which are no longer controlled by their members but by functionaries representing the party within parliaments or governments,

105) See Müller-Jentsch 1983.

106) Flanders 1970: 238-240.

107) Weitbrecht 1974.

108) Weitbrecht 1969: 64-74.

the industrial relations organizations are no longer controlled by their members but by functionaries acting within the representational collective bargaining system (109).

Collective bargaining theories have emphasized the process character of negotiations. Both in economic and in industrial relations research the focus has shifted to the internal mechanisms of collective bargaining (110).

Collective bargaining has been conceptualized as a power relation which is determined by strike threats (111). J.R. Hicks offers an economic theory of industrial disputes (112). His starting point is collective negotiations and, although he acknowledges the logic of unions engaging in strikes "to keep their weapon burnished for future use" (113), an industrial dispute is viewed mainly as the result of faulty negotiations. Thus formalization of joint meetings is for Hicks an obvious mechanism for avoiding industrial disputes.

Hicks' defence of employers against legally-minded arbitrators reveals the professional economic misunderstanding of industrial relations and collective bargaining. Arbitrators and conciliators of industrial disputes are advised by Hicks to smooth over misunderstandings, to make suggestions and to induce a frame of mind disposed to concession rather than to act as a judge thinking in terms of rights. For Hicks there is a danger in legally-minded arbitrators because they "cannot fail to be impressed by Trade Union claims, couched in terms of rights, to a customary standard, or to fair wages. ... Legalism is a bias; the arbitrator's job is to find a settlement that the

109) See Müller-Jentsch 1983: 128.

110) See Külp 1977: 36-43.

111) Hicks 1963.

112) Hicks 1964:136-158.

113) Hicks 1964: 146.

disputants can with advantage accept, not to impose a solution that seems to him fair and just" (114).

From an economic point of view the strike is a cost factor for both the employer and the union. The cost of a strike is part of the negotiations over wages. In Hicks' economic view negotiations are only perceived as interactions in which transactions of money claims are debated. At most, negotiations are seen as power relations in which union resistance matches employer concessions; These can then be put into supposedly sophisticated diagrams showing an "employer's concession curve" meeting a "union resistance curve". Thus Hicks analyzes strike threats as risk factors which form part of negotiations.

A number of approaches have transcended the simple neoclassical analysis of transaction costs and monopoly labour markets. The political dimension of collective bargaining has been emphasized and the prestige and reputation aspects of associations were singled out as determining factors (115). In addition, game theory with two players has been used to analyze collective bargaining.

The literature on collective bargaining has emphasized a number of factors which influence collective negotiations. Rudolf Wolters discusses information theory in order to analyze collective bargaining negotiations as an interaction system. The form and amount of information structure negotiations. Risk factors and socio-psychological processes of cognitive dissonance are mechanisms which start the search for information. The received information can influence the expectations of the participants. Thus the conscious release of information can be used as a strategy in negotiations (116).

114) Hicks 1964: 149-150.

115) Weitbrecht 1969; Himmelmann 1976; Wolters 1976.

116) Wolters 1976: 65-101.

Gerhard Himmelmann characterizes the collective bargaining system as a mechanism to find a compromise which depends on mutual recognition of the parties throughout their negotiations. He distinguishes six phases of negotiations in his analysis of German industry-wide bargaining between employers' and employee organizations (117):

1. Confrontation of issues
2. Consultation over details
3. Time of maturation
4. Cooperative search for solutions
5. Decision-making crisis
6. Conciliation, mediation or arbitration

Himmelmann's analysis includes in the sixth phase third party intervention. The next section on arbitration procedures concentrates on this form of communication. The involvement of a third party means a qualitative shift in the collective negotiations. In fact, it is a demonstration that negotiations have failed and a conflict of interest cannot be resolved between the parties.

Arbitration Procedures

The autonomy of collective bargaining depends internally to a large extent on the development of arbitration procedures. Once arbitration procedures are differentiated from negotiation procedures, the collective bargaining system has created 'its own immune system. Communication between the collective bargaining parties can continue even in case of open disagreement. Arbitration procedures provide an opportunity to continue communication "in einer gegen Normalkommunikation versetzten Weise" (118).

117) Himmelmann 1976: 135-190.

118) Luhmann 1984: 509.

An interesting insight into the limits of the autonomy of arbitration procedures was provided by Otto Kahn-Freund. In his account the state defines "vital interests of the community" which are threatened by strikes or lock-outs. If the self-regulated immune system of the collective bargaining system cannot handle these conflicts or adopts a view in which these conflicts form part of the conflictual negotiation strategies, the state usually intervenes with emergency procedures.

The general theory of third party intervention separates a number of variables in order to understand their relationship. Richard Abel, for example, distinguishes analytically conflicts (or disputes), third-party decision-makers ("interveners") and a theory of the conflict resolution process ("theory of dispute processing") (119). Abel emphasizes several aspects in his theory of dispute processing: specialization, differentiation and bureaucratization transform the conflict resolution process into a social institution.

This institution is centered around procedures. General dispute processing research distinguishes procedures according to the number of parties involved. Dyadic and triadic procedures (120) are separated from monadic conflict resolution like "avoidance" (121) and "self-help" (122).

The main dyadic form of procedure is negotiation. Two parties try to settle their conflict through bargaining. Negotiations are bargaining relationships which create the simplest form of conflict resolution (123).

119) Abel 1974.

120) See Spittler 1980a, Snyder 1983, and Nothdurft and Spranz-Fogasy 1986.

121) Felstiner 1974 and 1975.

122) On self-help through use of force which unilaterally dictates the solution of the conflict see Koch 1978: 85-115 and Spittler 1980b.

123) See Gottwald 1981: 38/39.

The transition to triadic procedures is fluid. Michael Barkun (124) has invented the idea of the indirect, invisible third party or mediator in negotiations. For him elements of the invisible third party present in negotiations are:

- the creation of mutually shared expectations which structure the proceedings;
- the influence of commonly shared norms, e.g. commercial customs or customary usage;
- the binding force of precedent;
- the wish or need to continue the established social relationship.

Third party intervention can be separated into four types of procedure:

Conciliation: The conciliator acts as a mere go-between; he is not allowed to present his own opinion about the case. He is a facilitator in communicating the proposals of each party.

Mediation: The mediator offers a solution after consulting the parties but his solution has no binding effect on the parties; the mediator is not obliged to decide.

Arbitration: The arbitrator issues a binding award. The binding effect of his award has been agreed upon by the parties before the arbitration takes place.

Adjudication: The adjudicator or judge treats the conflict as a case which is decided according to statutory rules or precedent. The case is processed in a formalized judicial procedure; the adjudicator has to decide.

Triadic procedures are structured by the degree of third party intervention. Whereas the third party's control power is insignificant in conciliation, the adjudicator

124) Barkun 1968: 100-114.

dominates the procedure through his official status. The stronger third party intervention is, the less influence the parties to the dispute have over the application of procedural arrangements, norms and rules.

Dispute processing research asks which factors determine the use of which procedure. Conflict theory (125) specifies the conflict as the substratum of the legal proceeding and uses differences in types of conflict as determining factors. In the conflict itself the conditions are established by which reactions can be analyzed. Thus for conflict theory, the choice of the procedural arrangement depends on the type of conflict.

Volkmar Gessner's study of the evolution and treatment of labour disputes and conflicts in Mexican private law attempts to investigate the correspondence between type of conflict and type of procedure. He has analyzed the filter effect of the multiplicity of conciliation institutions which precede judicial procedures (126). Using a classification deduced from systems theory, he divides disputes into norm (i.e. value and program), role and personal conflicts. Personal conflicts are said to be complex whereas norm-related conflicts show low complexity. The three forms of conflict correspond with three types of third parties: counsellor (Ratgeber), arbitrator and adjudicator:

- Personal conflict: counsellor
- Role conflict: arbitrator
- Norm conflict: adjudicator.

A different relationship between procedures and conflict types has been established by Aubert (127). He distinguishes between value-conflicts and interest-conflicts

125) See Röhl 1987 and 1979.

126) Gessner 1976: 101-138.

127) Aubert 1972.

and relates them to settlement by judgement and settlement by arbitration respectively.

Arbitration procedures differ to some extent among national systems. In the U.S. interest arbitration in cases of renewal or establishing a new collective bargaining agreement sometimes includes policy considerations of national importance to the United States. Whether arbitrators with a national reputation will handle these conflicts depends on the level of collective bargaining (local, regional, or national). In cases of labour conflicts considered to be "national emergency" situations by the national government, the arbitration procedure loses most of its private character. It becomes compulsory and the state, i.e., the federal government on behalf of the President or the Attorney General, intervenes in industrial relations using these procedures.

In the U.S. the Federal Mediation and Conciliation Service (FMCS) offers its assistance in "interest disputes". It has an independent "Office of Arbitration Services" which cooperates with the second major organization which provides arbitration personnel, i.e., the private American Arbitration Association (AAA). Both institutions administer lists of arbitrators who are willing to act as third parties. Arbitrators usually are members in the National Academy of Arbitrators. Being an arbitrator is still not considered to be an independent profession. The FMCS and AAA arbitrators are often publicly known figures who earn their reputations from service in other capacities. .

In contrast to the U.S. the state influence on arbitration is considerably higher in Germany. Arbitration procedures were introduced in Germany as a product not of self-regulation but rather of state regulation. In the 1890s so called Einigungsämter, located in the industrial courts, performed more or less voluntaristic arbitration.

In German labour law, conflicts of interest which occur during the establishment of a new collective bargaining agreement are called regulation disputes (Regelungsstreitigkeiten) as opposed to conflicts of rights. Regulation disputes remain by definition outside the jurisdiction of labour courts. In most branches the collective bargaining parties have concluded separate mediation or arbitration agreements (Schlichtungsabkommen) which provide for settlement procedures. These arbitration agreements differ in duration from the "normal" collective bargaining agreements in order to avoid interference with the general collective bargaining process. Arbitration procedures (Schlichtungsverfahren) over regulation conflicts vary among different industries and unions. The mediation or arbitration committee is usually characterized by a similar tripartite composition with an equal number of members from unions and employer associations and a neutral chairman (128).

In interest conflict situations where no special arbitration agreements exist or the settlement procedure fails, the parties first have to call upon a mediator selected by the state Minister of Labour and then take the conflict before a state settlement board which is a standing tripartite committee. In some states of the Federal Republic there are forms of compulsory arbitration (Zwangsschlichtung) the constitutionality of which are unclear (129).

The arbitration court (Schiedsgericht) handles conflicts which arise out of disputes over the interpretation of existing collective bargaining agreements.

128) See Weiss, Simitis, and Rydzy 1984: 95/6.

129) Zöllner 1983, p. 392, argues for the constitutionality of compulsory arbitration if it is restricted to extraordinary circumstances of a public interest of considerable importance. Weiss, Simitis and Rydzy 1984: 95/6, on the other hand, consider compulsory state settlement of industrial conflicts in general illegal.

It also acts on special types of employment conflicts that involve sailors and artists. The collective bargaining partners have to establish the arbitration court through a separate arbitration agreement (Schiedsvertrag). The composition of the arbitration court is bipartite; neutral members are allowed but not obligatory (130). This form of collective dispute handling is rarely used in Germany (131).

According to the Company Constitution Act, both the works councils and management have the right to invoke an external arbitrator in case of conflict over the interpretation of their company agreement. The powers of the arbitration committee (Einigungsstelle) are regulated in the Company Constitution Act. The external arbitrators are in most cases labour court judges.

Litigation of Labour Conflicts

It is quite characteristic of countries with active labour courts that these courts influence negotiation and arbitration processes in the industrial relations system through their decision-making. However, even in countries like the U.S. which have no separate labour court system the influence of the judiciary and the likelihood of litigation in labour and employment disputes is rapidly increasing.

a) Themmatization of Labour Law in Interaction Systems

Litigation can be studied as an interaction event in the industrial relations system. The first step towards litigation in interactions is the themmatization of law in a conflict situation.

130) Sec. 103 (1) of the Labour Court Act.

131) Däubler 1986: 900 and Königbauer 1971.

As in Luhmann's analysis of thematization in interaction systems (132), industrial relations interaction systems can thematize topics as industrial relations issues which indicate that the communication has to be understood as part of a wider system, i.e., the industrial relations system. Accordingly, if the interaction thematizes law, it refers to the societal function system known as the legal system.

The thematization of law in industrial relations communications is a common event in industrial relations systems. However, in countries with developed labour law systems and labour judiciaries the reference to law is a reference to an external power. This reference creates uncertainty and bears the risk of losing control over the negotiation topic. Thus law can be used strategically either to enable conflictual industrial relations communications to continue or to destroy and replace them with a legal mode of discourse.

Thus we can analytically distinguish in industrial relations communications between negotiations over a topic which is controversial between the parties and a situation of conflict. Only when the collective parties have reached a stage in their negotiations which requires external assistance has the controversy become a conflict. The resolution of this conflict can be attempted by introducing law into the communication, by using separate procedures which form part of the immune system of the industrial relations system or by delegating the conflict to a judicial body. Successful thematization of law in conflictual negotiations generalizes the conflict so that the interaction system can introduce devices which are provided by law for conflict resolution.

132) See Luhmann 1980.

Thus, the mention and use of legal arguments lead only in rare circumstances to litigation. Litigation is usually an exceptional event in the process of labour conflict resolution. The most important function of litigation is therefore to create the shadow in which negotiations and other forms of conflict resolution can take place. The option to switch interactions to judicial resolution can be used as a threat in negotiations. Either one or both parties can always end "informal" communications and switch to a form of communication which is required to reach a decision by a court or other judicial body.

The threat of litigation also initiates the use of procedures provided by the immune system of the industrial relations system. The institutions of labour conflict resolution which are created within the industrial relations system for breakdowns of communications operate as alternatives to litigation. Conciliation, mediation and arbitration often use legal techniques. However, there are important "thematization thresholds" for law in these industrial relations procedures. If the use of law threatens the control of the non-judicial procedures over the settlement process, the immune system must abstain from legal measures. In such instances these procedures have to generate their own rules and procedural devices. In any case, the so-called alternative procedures of labour conflict resolution have to find ways to thematize law in order to regulate themselves.

b) Industrial Relations and Labour Courts

Litigation of labour conflicts is carried out in labour courts or other special branches of the judiciary. In advanced, differentiated judicial systems labour courts form

a separate part of the judicial system on the same plane as other special or general courts.

Labour courts can achieve this position only if the judicial system in general has adopted internally the idea of differentiation as a mechanism for self-regulation. The judicial structures must have been reformed in a way which reflects internally the functional differentiation of society. In a certain sense, therefore, the existence of independent labour courts expresses an advanced stage of procedural differentiation in a judicial system.

As special judicial bodies, labour courts represent a form of self-regulation of the legal system which is guided by a particular view of industrial relations. The legal system perceives the industrial relations system as a corporatist, tripartite arrangement. Tripartite cooperation among the two major industrial interest groups and the state is used by the legal system as regulatory principle to organize and to differentiate a branch of the judiciary. With the organization of the labour judiciary, the legal system meets certain demands of the industrial relations system.

The internal organization of labour courts reflects the conditions of the industrial relations system. Unions and employer associations are usually allowed to represent their membership both collectively and individually in labour courts. Informality is generally an important goal in labour courts. Labour court officials are obliged to reduce the formality of the legal language in order to assist unrepresented parties. It depends, however, on their qualifications and occupational socialization of these officials to what extent they are able to switch between formal legal and ordinary language in the court room in order to respond to the demands of the parties.

Easy access to justice for individual employees and collective actors is also a concern of labour courts. Easy access for industrial relations parties is often put forward as a reason for the existence of labour courts during their establishment phase. Labour courts are thus designed to grant access to justice to financially disadvantaged employees, which is reflected in special provisions concerning costs and delays which are contained in the procedural codes of labour courts.

Elements of informalism are usually introduced in labour court procedures to foster settlements. Procedural formalism is only accepted to guarantee effective conflict resolution suited to the behavioural norms of industrial relations. Conciliation is favoured over adjudication. In addition, labour courts are supposed to pay some attention to the consequences of their decision-making for the industrial relations system. The organizational structure of labour courts is discussed in detail in Chapter IV.

Labour courts are characterized by structural relationships with the industrial relations system. In fact, labour courts rest on a whole infrastructure of procedures in companies and administrations. Their effectiveness depends, to a considerable degree, on the preparation and the shaping of the conflict in company procedures, in administrative procedures, and in the legal offices of the interest organizations.

The system of interest representation at the company level creates both advantages and constraints for labour courts. German labour courts, for example, provide special procedures for workplace industrial relations conflicts. Claims of works councils under the Company Constitution Act are treated in a special procedure (Beschlußverfahren). It has several procedural devices which reflect a facilitative approach designed to promote the self-regulation of works

counsellors and management with respect to their disputes at the company level.

Judicial research is used to conceptualize the relationship of labour courts and company dispute procedures with a filter model. Company procedures are studied according to this model in their capacity to filter those conflicts which need special treatment in judicial bodies. The filter model is generally court-centered (133). Procedures are ranked higher or lower according to different degrees of formalization and legality. Filter models implicitly favour judicial conflict resolution over other forms of conflict resolution.

An evaluation of dispute processing which uses the filter perspective is particularly inappropriate for the study of labour conflict resolution. Labour conflict resolution is characterized by a multiplicity of procedures which are functional equivalents to finding solutions for industrial relations conflicts. This insight is supported by recent alternative dispute resolution research which urges judicial research to include the study of conciliation, mediation, and arbitration and to attach just as much importance to the positive contribution of so-called informal procedures as to formal court procedures. Judicial research needs legal pluralism, which is a concept that demonstrates that judicial and extra-judicial procedures are not hierarchically ordered but vertically arranged.

133) Blankenburg et al. 1980.

Industrial Relations, Labour Conflict Resolution and Corporatism

There is a special characteristic of labour conflict resolution which distinguishes it from other forms of conflict resolution. This special characteristic derives from its structural links with the industrial relations system in general. The institutional structure of industrial relations communications is characterized by tripartite arrangements between the industrial interest groups and the state. These tripartite arrangements of collective actors have been described as corporatist arrangements.

Corporatism is conceived in the present study as a concept to analyze the cooperation of industrial interest groups and the state. Corporatist structures are characteristic of a semi-autonomous stage in the development of industrial relations systems. In fact, corporatist structures characterize most industrial relations systems, although to different degrees and in different forms.

Whenever negotiations of collective interest groups include state participants, the industrial relations system develops tripartite structures of exchange. The structures shall be called liberal corporatism. Liberal corporatism creates the structural context for the institutions of labour conflict resolution in which they are embedded.

Two versions of corporatism must be distinguished: authoritarian and liberal corporatism. The authoritarian version emphasizes the need of the state to rely on traditional societal organizations such as guilds. This concept of corporatism transcends industrial relations. It was adopted by Italian and German Fascist state theories that used it to legitimize the extension of state control

through new societal organizations which were linked to the Fascist movement (134).

The concept of corporatism has been revitalized by political scientists in the 1970s (135). A new conception of liberal corporatism is used to analyze the welfare state. Liberal corporatism is in a certain sense a response to pluralist notions of steady change in intermediation processes; instead, cooperation of the industrial associations and the state is analyzed in terms of stable institutional network of organizational links.

Three forms of liberal corporatism can be distinguished: macro- meso- and micro-corporatism. Whereas macro-corporatism is located at national level and micro-corporatism at the local or company level, meso-corporatism is characterized by tripartite structures which involve regional or sectorial professionals of both the state and interest associations (136). Labour courts and other official institutions of labour conflict resolution are usually located at this meso level.

Meso-corporatism

The corporatist concept argues that the state not only critically supervises negotiations between collective interest groups but also increasingly takes advantage of these systems of negotiations for both formulating and implementing policies. Empirical studies of corporatist policy-making in the various conflict areas are increasingly narrowing their focus from national to sectorial, regional

134) See only Bowen 1947.

135) Schmitter 1974; Winkler 1976; Panitch 1979 and 1980.

136) See the "three-level analysis" of corporatism in Wassenberg 1982; meso-corporatism in industrial policies is discussed in Cawson 1986, ch. 6. See also Teubner 1983: 26/7.

or local bargaining, including networks of the welfare state and associations on this level (137). They have uncovered an increasing number of independent, decentralized corporatist arrangements.

To a certain degree, this shift to meso-corporatist studies (138) is a response to compelling changes in current politics. The collapse of "social contract" policies on national levels in major Western countries in the 1980s has encouraged theorists of neo-corporatism to look at lower strata of the political process or even to talk about a post-corporatist state (139).

Analytically, the concept of corporatism is characterized by tripartism, the intermediation of state and group interests and the conciliation of conflicts (140). Meso-corporatism "involves political exchange between state agencies and specialized interest organizations" (141). We can add an element which Philippe Schmitter stresses in his well known definition: the intra-organisational aspects of control in exchange for a representational monopoly of the association (142).

The study of intra-organisational structures of industrial associations (once accused of being the 'Achilles Heel' (143) of neo-corporatist studies) has concentrated on the internal status of members, the general development and composition of its membership and on the shop-floor influence of associations (144). Little attention has been

137) Schmitter 1983 and 1984, Offe 1984 and Jessop 1990, ch. 4. See for Britain Cawson 1982 ("fragmented state") and Grant 1985.

138) See Cawson 1985 and 1986, ch. 6 and Williamson 1989: 156-167. See also Rogowski 1985.

139) As Lewis and Wiles 1984 suggest for the British case.

140) See von Beyme 1984: 224.

141) Cawson 1986: 118.

142) Schmitter 1979: 13.

143) Teubner 1979: 497.

144) See Streeck 1981; Heinze 1981 and from a legal point of view Teubner 1978.

given to the service activities of associations (145). Research in this field is still dominated by the assumption of the differing organizational interests of leadership and of rank and file. It distinguishes between the political function of the association and its leadership and its service function towards its members (146).

Wolfgang Streeck argues that the important organizational consequences of neo-corporatist cooperation for associations are functional specification, professionalization, formalization and administrative rationalization (147). But for our purposes, we have to go beyond the intra-organisational analyses pursued by Schmitter and Streeck and switch our attention to the increased political activities of associations at the middle level of politics. We can follow studies on welfare corporatism which analyze corporatist relations within the context of social policy and its implementation; and it is the process of incorporation which becomes important in this respect (148).

Exchange processes with the political system do not only occur at the top level of politics. The servicing of members is not an apolitical intra-associational affair. Representatives of associations participate at the middle level of politics in administering the welfare state, usually as so-called lay members in administrative or judicial decision-making procedures. A constant political exchange occurs when representatives of the association act as officials in judicial or administrative procedures. These are indeed forms of stable network relations between

145) Research on legal advice provided by associations is discussed in Gawron and Rogowski 1982.

146) For a general account see Olson 1971; this concept has been used in the research design of the project on business interest organizations in Streeck and Schmitter 1981.

147) Streeck 1982.

148) See Harrison 1984. See also Cawson 1982.

associations and state agencies. They are organizational experiences of Teubner's role interference concept.

The political exchange at the middle level of politics creates continuous professional relationships between administrative institutions and associations which have been described as welfare corporatism (149). The interest in defending the meso-corporatist arrangements created by professional and bureaucratic representatives will affect its procedure. A depoliticization of issues is likely to occur as the main effect of the incorporation of interest groups.

It is constitutive for corporatist arrangements in social policy areas that associations or professional groups remain strong monopolies of interest representation "to defend themselves against bureaucratic incursions or market pressures" (150). Corporatist arrangements operate on the basis of interest intermediation. Professionals of associations take an active part in the functioning of welfare agencies in order to maintain service functions for members; through participation in welfare corporatism, associations gain public status and can exercise influence in other social fields where direct associational control is lacking. In exchange, the integration and "licensing" of the behaviour of interest associations help the welfare state to absorb political criticism (151).

149) Cawson 1982 and 1986: 115-118. See also Williamson 1989, ch. 8.

150) Cawson 1986: 116.

151) Williamson 1989: 84-89.

Macro-corporatism

Whereas meso-corporatism is defined as political exchange between state agencies and interest associations at a sectorial or regional level, macro-corporatism is defined as involvement by peak industrial associations in national policy-making. Leaders of associations offer internal control of members in exchange for political concessions on the behalf of their organization and the represented interests at the legislative level. At the level of the national state the German-speaking countries have experimented with a number of redistributive measures (152). Helmut Willke has analyzed macro-corporatist arrangements as discourses of societal subsystems. They transform conflict between systems, which derives from their increasing autonomization, into cooperation. The state is perceived as the catalyst for this transformation of conflict into cooperation (153).

Uwe Schimank and Manfred Glagow have argued that the functional differentiation of society does not only lead to the macro-corporatist interdependency of functional subsystems but also to the self-regulation of function systems. In participating in corporatist arrangements, the associations transcend their interest orientation and adopt a functional view of society. This functional view enables them to limit and adjust their own self-regulation to the reproduction of society at large (154). However, this macro-perspective on neo-corporatism lacks to some extent the study of the actual operation of these arrangements. In systems theoretical terms, macro-corporatist arrangements are simply interaction systems.

152) von Beyme 1985: 116.

153) Willke 1989: 99-110.

154) Schimank and Glagow 1984: 13.

In fact, macro-corporatism is a somewhat misleading description of exchange relations between systems in high-powered interaction system. It suggests a stable exchange between unions, employers and the state. However, the structure of the exchange system is rather unstable and difficult to organize due to its character as an interaction system at national level.

The German experience provides some insights into the limits of self-regulation of a macro-corporatist interaction system. The so-called Concerted Action negotiated about macro-political issues which included monetary stability and foreign-exchange relations. Compared with collective bargaining at the meso- and micro-level, the interaction system of the national actors had to deal with immense new pressures. The traditional mechanisms failed to function.

"Die Tarifparteien als konflikt-orientierte ökonomische Akteure sehen sich in der Konzertierte Aktion als einem Verhandlungssystem Zwängen ausgesetzt, welche ihren traditionellen Rollen als einfache und einseitige Interessenvertreter widersprechen. Beide Parteien können nicht mehr einfach Gegner sein mit klar geschnittenen widersprüchlichen Strategien. Sie können nicht mehr schlicht externalisieren, also auf Dritte abwälzen. Sie können nicht mehr zugrunde legen, daß die traditionellen Formen der Konfliktregulierung - Verteilung des Zuwachs, Streik und Anpassung, Stabilisierung des Beschäftigungsniveaus und Ausschließung der Nicht-Beschäftigten - zugleich auch optimale Lösungen für das Gesamtsystem entwickelter Gesellschaften ergeben." (155).

Indeed, the interaction system of the Concerted Action showed major structural weaknesses. From the point of view of conflict resolution it was crucial that this system was unable to establish procedures which prevented conflicts of opinion between the participants from influencing the tripartite negotiations. The national interaction system had not established arbitration mechanisms to immunize itself from conflictual interruptions of communication.

155) Willke 1989: 102-103. See also Willke 1983b.

Indeed, the Concerted Action was weak with respect to its self-regulatory capacity. It resisted adopting procedural rules and a statute (Satzung) and declared its decisions to be exempted from judicial review (156).

Macro-corporatism had an impact on the development of labour law in Europe mainly in the 1970s and in some countries also in the 1980s. Brian Bercusson has listed a number of macro-corporatist regulations which were enacted in major European countries during the 1970s (157). He describes the difficulties labour lawyers had understanding the macro-corporatist activities of industrial relations and describing them in traditional labour law terms. Because the agreements reached by the peak interest organizations and the state were rather gentlemen's agreements than enforceable contracts, the law was unable to deal with them in the usual way. Indeed, labour law was not capable of "di fronteggiare e selezionare la crescente complessità di domande" arising from neo-corporatist arrangements, as Luigi Mengoni has put it (158).

Micro-corporatism

There exists a certain ambiguity in the use of the concept of micro-corporatism. Not all authors consider micro-corporatist arrangements to be defined by tripartite structure. Thus Alan Cawson has warned "not to identify all examples of plant level bargaining as 'micro-corporatist'" (159). In his view, one can only speak of micro-corporatist arrangements when state agencies are centrally involved in decision-making processes at the company level. The examples he has in mind are direct negotiations of planning

156) See von Beyme 1977: 257 and Schmitter 1988 317.

157) Bercusson 1991: 16-20.

158) Mengoni 1988: 416.

159) Cawson 1985: 16.

agreements between state agencies and single companies or the prescription of legally non-enforceable agreements as a precondition for subsidies assistance or support (160).

Peter Williamson criticises bilateral micro-corporatism. "If 'micro-corporatism' has any relevance it must take a tripartite form." (161) However, if associations of labour engage in interest intermediation at the level of the individual firm, Williamson sees scope for micro-corporatist arrangements.

Teubner argues similarly but is less concerned with tripartism being a major element in the definition of corporatism. In his discussion of micro-corporatism at the company level, the state need not be present as a third party. His examples of micro-corporatisms are Scandinavian and German statutory co-determination, French voluntary "cogestion", and Italian informal participatory rights of workers (162).

Teubner has analyzed a development of neo-corporatist experiments which he calls "involution" from macro- to micro-corporatism (163). Whereas macro-corporatist arrangements decline, micro-corporatist arrangements at the company level are put forward as a promising alternative strategy of industrial flexibilization.

For Teubner, neo-corporatism as the "voluntary" symbiosis of capital, labour and state develops hierarchies of employers' associations, trade unions and state bureaucracies which can be used for policy formulation and policy implementation. Neo-corporatism gained a procedural flexibility which became more compatible with the structure of Western economic systems than its alternatives.

160) Cawson 1985: 16-18.

161) Williamson 1989: 165.

162) Teubner 1989: 165.

163) Teubner 1989: 165-166.

Micro-corporatist arrangements offer flexibility through organization. A key feature of this flexibilization is the decentralization of the company organization. Corporatist arrangements are advantageous for the organization compared with its contractual arrangements for the following reasons: first, they foster lasting exchange relations of corporations; second, commitments within the organization are less rigid in adapting to situational changes than contractual relations; and third, the orientation of the actors towards the organizations' interests is more stable than under contractual arrangements (164).

Neo-corporatist arrangements at the company level lead to "producer coalitions" of capital and labour. The participants in corporatist arrangements treat each other as equals. These micro-corporatist arrangements mediate between the different resources of capital, labour and state interests at the company level. The carriers of resources delegate their rights to the resource to the micro-corporatist arrangement. The arrangement becomes a corporate actor which is constituted as a producer coalition. The arrangement is guided by its own efficiency criterion. Thus involution of neo-corporatism in Teubner's view means a trend from coordination of national economic policies at a macro level to producer coalitions in corporations at a micro level.

It can be predicted that these producer coalitions can only develop into viable autopoietic systems if they adopt mechanisms of conflict resolution. Like macro-corporatist arrangements, these micro-corporatist interaction systems need to protect their autonomy from external and from internal threats. The tradition of the collective bargaining system is a source which can provide a number of examples of immune systems which enable self-regulation of

164) Teubner 1989: 167.

conflict resolution by the system and from which micro-corporatist arrangements might learn.

CHAPTER III

COMPANY DISPUTE PROCEDURES

Company dispute procedures handle both grievances of individual employees and conflicts of employee representatives with the management of the company. From a systems theoretical point of view these procedures are interaction systems which are linked both to the industrial relations system and to the organization system of the company. Their autonomy depends on their self-reproductive operations, which constitute their identity as interaction systems. The mechanisms to secure the autonomy of the interaction system have an influence on the degree to which they are accepted as independent interaction systems within the company.

A number of social systems interfere in company dispute procedures. The industrial relations system operates and understands industrial relations procedures both as formal and informal collective negotiations which instrumentalize the law for industrial relations purposes. The legal system reconstructs the formal aspects of procedures in legal terms in order to be able to refer to the company procedure for its own decision-making purposes. And the company understands dispute procedures as part of the economic enterprise and thus relates to them in specific economic terms.

Dispute Procedures in Industrial Relations Research

We can distinguish two main types of systems of company dispute procedures: the constitutional type and the collective bargaining type. In the German case the company

dispute procedures form part of the company constitution. They are legally separated from collective bargaining between unions and employers. A different kind of "company constitution" with elected employee representatives exists in France.

In the Anglo-American world one can distinguish the case in which the industrial relations system has kept control over company dispute procedures and thus has designed them according to the collective bargaining model, from the case in which these procedures are dominated by personnel management strategies. In the latter case procedures sometimes are based on models of consultative "industrial democracy" at the company level; often, however, they are in fact instruments of human resource management strategies which intend to circumvent collective bargaining in order to deal directly with the employees on an individual basis.

In addition to the constitutional and the collective bargaining model, a third type of company dispute procedure can be distinguished which is the result of legal employment protection measures or of the implementation of official Codes of Practices. These procedures are designed simply to prevent management from acting arbitrarily in dealing with employees. Before these types are described with respect to the four countries under comparison, there will be some general remarks on the relation of procedure and dispute and the approach of labour process research to company procedures. In addition, we shall discuss a classification scheme of types of company dispute procedures and their emphasis on certain elements and structures of company dispute procedures.

Grievances, Claims and Disputes

Industrial relations research often derives its classification of company dispute procedures from analyzing the underlying conflicts. In the literature on company dispute or grievance procedures we find the following distinction between grievances and claims:

"A grievance begins as an expression of dissatisfaction by an individual or group of employees whereas claims typically originate higher in the union hierarchy in the name of large groups or all union members in the plant or beyond." (1)

Grievances and claims are related to different types of conflict. Grievances are related to employment conflicts and claims are related to labour conflicts. Whereas grievances are handled in grievance procedures, claims fall outside these procedures and come within the arena of collective bargaining (2).

It is widely perceived that grievances are product of processes and thus not defined by a single event. Thomson and Murray (3) describe the phases of a typical grievance process as follows:

- a triggering event manifests latent dissatisfaction;
- dissatisfaction is clarified and an opponent is identified;
- the allegedly responsible person is confronted with the grievance (usually a foreman and a union representative);
- "mutual probing" is exercised to clarify how the other side feels about the issue;
- management has to make a first decision on handling or lumping the grievance;

1) Thomson and Murray 1976: 18.

2) This distinction between grievances and claims seems widely acclaimed in industrial relations research. See ILO 1965: 7-9; Lockwood 1955; Dahrendorf 1957: 71/72

3) Thomson and Murray 1976: 18-21.

- reaction phase: the grievant has to decide whether or not to follow procedures in case of an unsatisfactory management decision. Available reactions are persuasion, positive or negative bargaining (offering of benefits or use of threats), punishing actions or problem solving to discover a mutually beneficial solution.

This conceptualization of the grievance process derives its persuasion from its descriptive character. However, it lacks to some extent analytical clarity. This can be achieved by adopting insights from general dispute-processing research. This research emphasizes that the origins and early transformation processes of disputes are important in order to understand the rate of occurrence, the distribution of disputes as well as the methods chosen to solve the dispute. Felstiner et al. (4) define a dispute as the result of failed interactions. A problem only becomes a dispute after it has gone through the three phases of "naming", "blaming", and "claiming". First, a problem must be perceived by at least one disputant. Secondly, the disputant must blame someone else as responsible for the problem. And thirdly, the disputant must claim redress from someone. Thus, a dispute occurs only after a monetary or other type of claim has been rejected.

Employment conflicts are special for two reasons. They occur in organizations, i.e., a firm, an enterprise or an office, and their resolution is shaped by the interests of collective actors. The transformation processes of "naming", "blaming", and "claiming" of labour disputes are embedded in collective processes. Conflicts at work are related to institutionally prescribed roles of the workplace organization. Although the labour conflict might also be related to norms or to personal characteristics of the disputants, the institutional context and the collective interest groups involved almost always convert the labour

4) Felstiner et al. 1981.

dispute into a role conflict (5). Acting in roles is thus an important characteristic of social conflicts at work.

However, it is important to separate the definition processes of a conflict at the shop floor, in the personnel department or in the mind of the employee from the definition of the conflict by the interaction system of the grievance procedure. The role definition in the company at large and the types of conflict influence the interaction system only insofar as they are introduced and accepted according to the rules of the company dispute procedure. From a systems theoretical perspective the role distinction inside the company and the different sources and types of conflict form only the necessary context in which the interaction system operates.

There is some discussion in general dispute processing theory if disputes should be treated as an objective baseline outside procedures, against which procedures can be evaluated (6). In a systems theoretical understanding, however, functions of grievance procedures are sought with respect to internal structures of dispute resolution rather than external factors. The procedures are analyzed as autonomous interaction systems which have a capacity to define what can be treated within their realm. A radical systems theory perspective takes the internal point of view of the interaction system. It assumes that it is the nature of the autopoietic process, the structure of the procedure and the rules developed within it which enable the system to define the dispute. Thus it is not the "nature" of the grievance which defines the procedure but it is the procedural system which selects conflictual communications of the company system to be treated inside the procedural

5) Falke and Gessner 1982: 303-4 distinguish role conflicts from personal and norm conflicts. In particular, norm conflicts with low degrees of social interdependence are characterized by a high inclination for external interventions. See also Gessner 1976.

6) See Griffith 1983.

system. Thus the transformation of a "claim" into a grievance depends to a large extent on the conditions of the institutional arrangements of procedures.

Industrial sociology studies often show that conflicts at work cover a variety of meaning. They may be about basic principles of work organization (class conflict); they can arise from tensions in a set of work relations (recurrent collective bargaining) or they can be related to single incidents (strikes or employment disputes) (7). Conflicts at work are said to occur on three different levels. Overt and non-directed conflicts occur at the behavioural level, institutionalized conflicts at the institutional level, and implicit conflicts at the structural level (8).

However, analytical or structural definitions of a dispute differ between external observers and the participants in company dispute procedures. The empirical research usually adopts a pragmatic or interactionist approach to find out about the participants' views of the problem of defining a grievance. It studies industrial conflicts which are actually handled in labour dispute procedures as the participants do and finds out about these conflicts from the observable descriptions of conflicts in grievances or claims. The systems theoretical approach benefits from this empirical research insofar as it informs about the interaction system, i.e., its operations and its self-descriptions.

7) Edwards 1986: 5.

8) Edwards and Scullion 1982: 9-14.

The Research on the "Labour Process" and Labour Conflicts

The research on the "labour process" claims to have adopted a comprehensive approach to the study of labour and employment conflicts at the workplace. This research is interested in control, resistance, and cooperation on the shopfloor (9) and views the labour process as a semi-autonomous process in which production patterns, managerial strategies and control mechanisms create, shape and prevent conflicts and cooperation at the workplace. The conditions of the labour process are used to explain rates of voluntary and involuntary labour turnover, absenteeism, sabotage, and other breaches of factory discipline ("pilfering and fiddling"). In particular, effort bargaining, i.e., conflicts over the amount of effort for a particular wage, is considered a prime example of both the relative autonomy of the labour process and managerial control (10).

Michael Burawoy emphasizes conflict prevention as a major result of the labour process. Workers normally consent to managerial control because of a "pragmatic role acceptance" (11) as the prevalent mode of behaviour among workers. The labour process is perceived by workers as a game, i.e. "a set of limited choices". The consequence of participation in the game is rule obedience and reduction of conflict. "Playing a game generates consent to its rules." (12) Overt conflict becomes rather exceptional or pathological in this game.

In criticizing Burawoy, P.K. Edwards insists that capitalist work organization is based on "structured

9) See only Burawoy 1979 and 1985; Edwards and Scullion 1982 and Edwards 1986.

10) Edwards and Scullion 1982.

11) Mann 1970.

12) Burawoy 1979: 93.

antagonism" which involves both cooperation and conflict (13). And it remains an open empirical question for Edwards as to what extent the labour process generates conflict or cooperation. However, Edwards can be criticized for his failure to develop definite empirical predictions as to the balance between conflict and cooperation.

Labour process research has been criticized for its reductionist neglect of aspects both of the employee autonomy and cultural embeddedness. Charles Sabel emphasizes that conflict at work is often caused by subjective cultural factors, i.e. the worker's "concept of intolerable injustice" and his "determination to defend his everyday conception, which as a whole is comprised of illusions and truths inextricably mixed". An employee's militancy is thus a "sign as much of his world views as of his position in the production process" (14). These world views are caused by factors external to the labour process which thus undermine the autonomy of the labour process itself.

In a recent analysis of factors that influence the diffusion of grievance procedures Laura Edelman has emphasized that legitimacy rather than control was the imperative which drove this form of organizational governance. According to her study, grievance procedures were invented in the U.S. because "the civil rights movement of the 1960s created a normative environment in which legitimacy was conditioned upon fair governance" (15). Once this symbolic gesture to the normative and legal environment has led to the establishment of grievance procedures it can become a forum in which employee interests are given a voice in the company (16).

13) Edwards 1986.

14) Sabel 1982: 15.

15) Edelman 1989: 2-3.

16) Edelman 1989: 33.

Labour process research considers dispute procedures as part of a system of control at the workplace. Conflicts are related as much to the 'struggle' between deliberate managerial strategy and workers' resistance as to the organization of work, which "is created by the day-to-day activities of both sides as they try to deal with particular sets of circumstances" (17). Labour process research helps to understand that formal workplace institutions like dispute procedures are based on these informal arrangements of work organization. "Adaptation and accommodation are as important as deliberate efforts to assert or resist 'control'" (18). It has the advantage of integrating variables of power relations and production patterns in the analysis of workplace organization.

However, labour process research has so far not developed much interest in the relations of formal and informal dispute resolution. Surprisingly, formal dispute institutions have been largely neglected by this research. Although Burawoy acknowledges that "factory regimes" vary independently of the labour process, he underestimates the relative independence of formal workplace institutions (19). Historically, grievance procedures are as much a product of state intervention as they are linked to the labour process itself; in fact, they are dependent on both. "Production apparatuses" are most often a result of both state interventionism and formal processes of control of labour at the workplace. And they then develop as interaction systems according to their own autopoietic logic.

There are several debates on the sources and driving forces behind the introduction of grievance procedures. Traditionally, unions are perceived as the main source. Where unions are active on the shop floor they have an interest in acquiring recognition. Establishing joint

17) Edwards 1986: 77.

18) Edwards 1986: 77.

19) Burawoy 1985: 37-48.

procedures is a good way for unions to become indispensable. These procedures are also means of integrating unions. Unions have to develop cooperative attitudes and reduce adversarial behaviour when they participate in decision-making.

The activity of unions, even in a declining era, are said to have radiating effects with respect to work place institutions. For example, the introduction of grievance procedures in non-union firms is attributed to unionism. The adoption of grievance procedures in non-union companies was reported in nine out of ten cases to be the result of union pressure (20). Non-union grievance procedures are strategically used as instruments to prevent the work force from unionizing.

The arguments of labour process research can be summarized as follows. The system of formal decision-making over conflicts at work has its own 'relative autonomy'. It exercises not only disciplinary control over employees but also certain control over its input. Conflicts at work have to be defined as matters for the grievance procedure, and this transformation has to be mastered before a grievance can enter the grievance machinery. But labour process research stops asking questions at this stage. It does not engage in analyzing the operations of grievance procedures and it does not understand their autonomy.

Elements and Structures of Labour Dispute Procedures

A socio-legal account of labour dispute procedures, which adopts systems theory, is able to analyze the operations of company dispute procedures which constitute these procedures as interaction systems. It goes beyond the

20) Freeman and Medoff 1984: 154.

traditional institutional approaches which are mainly concerned with structural aspects of the procedural systems.

Traditional approaches in the study of grievance procedures look at participants involved and only occasionally at the subject matters of disputes. On the European continent, and especially in French and German speaking countries, the distinction between individual and collective conflicts is not only used to separate the two major areas of labour law but also as a means to differentiate procedures. The resolution of individual labour disputes is generally attributed to judicial procedures while the settlement of collective labour disputes is largely attributed to voluntary ones.

There have always been discussions about the use of this distinction with respect to the separation of dispute fora (21). A majority of dispute procedures, even in countries which place strong emphasis on the distinction between collective/individual disputes, handle both types of conflicts. Company grievance procedures deal with employment conflicts of individual workers as well as of a group of workers or a trade union. And labour courts are not only concerned with conflicts between two individuals, i.e. one employer and one employee, but also often with collective interests represented by unions and management; in addition, judicial procedures handle conflicts which often appear on the surface as individual conflicts, such as grievances of a trade union member with his or her organization, which in fact often relate to interests of many other members.

Another common approach to classifying procedures is to emphasize their bargaining context. Grievance procedures are thus located at different levels of the collective bargaining process. Comparative research of the

21) Hanami and Blanpain 1986: 7 and 8.

International Labour Office reports that a majority of Western countries distinguish three types of collective bargaining disputes (22):

- 1) Recognition Disputes: These conflicts are related to the recognition of trade unions as bargaining parties and usually arise before collective bargaining actually begins.
- 2) Interest Disputes: These conflicts arise during the establishment of a collective bargaining agreement.
- 3) Rights Disputes: These conflicts occur after the establishment of collective bargaining agreements and are related to their application and interpretation.

This classification of grievances in the context of collective bargaining relates procedures to different conflict levels and parties to the conflict. The distinction between recognition/interest/rights disputes assumes that each type of collective bargaining dispute requires a specific forum and type of dispute resolution. In general, recognition disputes are associated with administrative decision-making, interest disputes with arbitration and rights disputes with adjudication.

Although the literature generally still ascribes to this assumption, one also finds doubts about its appropriateness. Benjamin Aaron expresses his doubts in the following metaphorical language:

"... the line between disputes over rights and conflicts over interest is not always an impregnable wall; rather, it sometimes is more analogous to a semi-permeable membrane, through which disputes that are nominally of one type pass and are handled under procedures (sic, R.R.) usually reserved for disputes of the other type." (23)

The relation of types of labour conflicts to certain types of procedures begins to blur. Thus for a comparative socio-legal account it becomes insufficient to differentiate

22) Background Paper in ILO LMRS 56 (1977): 36/7

23) Aaron 1982: 260.

grievance procedures only with respect to the nature of participants or with respect to the location of dispute settlement at collective bargaining levels. The nature of the dispute and the substantive rules involved are of equal importance.

There are some attempts to distinguish elements and structures of labour dispute procedures analytically. Anselm Strauss' (24) description of negotiations and Melville Dalton's study (25) of continuous working relations in industrial firms distinguish three sets of variables: institutional variables, content variables and process variables. This analytical distinction is a useful tool for the following description of company dispute procedures in four countries.

The institutional variables relate to the formal structure of and participants in grievance procedure. The degree of professionalization and experience of negotiators is an important variable. Experienced negotiators are engaged in repeated negotiations which create a web of commitment. These negotiators represent not only the grievant, who is often not required to be present during negotiations, but also themselves. They are concerned maintaining a "balance of favours" and accumulating mutual obligations.

The content variables relate to stakes. Formally, stakes in grievance procedures are defined (and confined) by law or by national collective bargaining agreements. Company agreements are only meant to implement law or national agreements. However, the standards established in statutes and national agreements can only broadly define issues and stakes. These standards have to leave specific contents and details to be arranged in company agreements. In addition to company agreements the relative autonomy of

24) Dalton 1959.

25) Strauss 1978: 122-141.

the work place is enhanced by customs and practise. Custom and practise at the company level might, for example, allow a situation where grievance procedures are open to any grievance on the shop floor regardless of the definition of grievance in the company agreement. In another case, though, the definition of grievance might be even further restricted by the procedure than by what is stated in the agreement. According to Strauss, one possible hypothesis in this context is that the more ambiguity exists about legitimate boundaries for stakes, the more complex are the outcomes.

The process variables relate to the degree of flexibility and control in negotiations. The process is influenced by the threat and use of power or undesirable action as an option to one or both negotiators. The process of negotiation needs a certain degree of autonomy. It has to be free from direct intervention by outside forces, i.e., management and union leaders. Thus, covert negotiations occur hidden from persons who could endanger negotiations. Ways to bypass and mediate previous negotiations and to allow trade-offs constitute informal procedures.

A rather descriptive socio-legal approach to classifying procedures is taken by the ILO study on Conciliation and Arbitration Procedures in Labour Disputes (26). It looks at the type of dispute resolution and thereby distinguishes four main types: (1) negotiation; (2) mediation and conciliation; (3) arbitration; (4) adjudication. This ILO study presents a careful and complex comparison of relevant forms of labour conflict procedures. It distinguishes the nature of procedures from the ways of establishing procedures, e.g., collective agreement, statutes, or other sources. The distinction in the nature of the procedure refers to voluntary or compulsory decision-

26) Cf. ILO 1980: 1 and 4-16; the study concentrates on mediation, conciliation and arbitration procedures with only occasional references to adjudication.

making and thus to "public policy concerning dispute settlement"; if "emphasis is placed on the parties and on ... compromise", procedures tend to be rather voluntary; if "greatest emphasis is placed on the avoidance of work stoppages", the nature of the procedure tends to be compulsory (27).

With respect to a comparison of grievance procedures, a fifth form of labour dispute in addition to those in the ILO study might be added which relates to the administration of labour conflicts. This form of third party intervention, however, is not exclusively concerned with dispute resolution. It is related to factory inspection and the surveillance of safety and health standards. These administrative grievance procedures, in which an agency resolves disputes in a court-like manner, can be characterized as quasi-judicial state interventionism. The disputes which are handled in administrative grievance procedures are often created by the administrations themselves through active interference in company affairs.

Dispute procedures differ insofar as some are only designed for an ad hoc conflict resolution perspective whereas others engage in the maintenance of long-term relations. However, each procedure is an interaction system which must be able to identify itself if it wants to survive as a procedure. It must therefore primarily observe its need for self-reproduction, and only on this basis can it perform tasks for other systems. Thus the process of "task accumulation" in a procedure might be an expression of lacking "task allocation" between different types of procedure. But it certainly indicates the capacity of the system to handle a variety of conflicts due to its strongly secured autopoiesis.

27) Ibid: 16.

Dispute procedures also have developed a remarkable capacity to instrumentalize different forms of third party intervention. Arbitration is the most used form of third party intervention at the company level. It has encountered a remarkable process of differentiation. Dean Pruitt gives a good overview of the different forms of arbitration:

"Arbitration can be either voluntary, in the sense of being requested by the two parties, or compulsory, in the sense of being imposed by law, contract, or outside pressures. Whether voluntary or compulsory, the two parties usually have a hand in choosing the arbitrator except in the special case where arbitration is by a court. Three types of arbitration can be distinguished: conventional, final offer, and med-arb (a combination of mediation and arbitration). In conventional arbitration, third parties have the leeway to make any award they wish. In final offer arbitration, third parties must choose one or the other party's final offer, having no right to improvise. There are two varieties of this procedure: In the issue-by-issue variety, arbitrators can choose one party's offer on issue A and the other's offer on issue B. In the total package variety, they must choose one or the other party's entire set of offers. In med-arb, third parties first mediate and then, if that fails, render a binding award." (28)

From a systems theoretical point of view arbitration forms part of the structure of the interaction system. Third party involvement must be compatible with the internal settlement process of the procedure. It is thus important for the procedure to exercise control over the third party to avoid irrational interference. The third party must be bound into the rationality of self-regulation of the procedural interaction system.

Thus it can be stated as a rule that the imposition of arbitration models can only be successful if these models find response in internal processes of self-regulation in grievance procedures. Different types of arbitration must reflect the different concepts of self-regulation of procedures.

28) Pruitt 1981: 218.

Four National Labour Dispute Procedure Systems

The jurisdiction and institutional structure of dispute or grievance procedures differ widely among industrial relations systems. In the following, the national labour dispute procedure systems of the U.S., Great Britain, France and Germany shall be analyzed and compared. Throughout the description, the terms "grievance procedure" and "dispute procedure" will be used synonymously. Although Hugh Clegg's suggestion to use the first for a description of collective conflict handling and the second for a description of individual dispute processing (29) seems an analytically sound proposal, it is not followed for two reasons: First, the literature on industrial relations does not, in general, adhere to this distinction. And more importantly, the industrial relations practice does not distinguish clearly between collective and individual dispute treatment, as will be illustrated by some examples in the following overview of national labour dispute procedure systems.

France

The French labour dispute procedure system is a relatively new phenomenon.

French labour law provides three formal channels at the factory level through which management can be approached by the employees and the unions: délégués du personnel, comité d'entreprise, section syndicale.

29) Clegg 1979: 229, Fn. 1.

The Personnel Delegates (Les délégués du personnel)

The institution of délégués was introduced by the Law of 24 June 1931 and the Law of 16 April 1946. The delegates are elected each year by ballot of the personnel. Elections can be held in all establishments with more than ten employees. There may be as many as four separate electoral colleges, namely blue collar workers, white collar workers, foremen, and cadres (30). The unions have the right to put forward the candidates for the first ballot and most delegates are active union members (31).

The main task of personnel delegates is to ensure the implementation of existing rules at the workplace. According to their jurisdiction the delegates have to bring to the attention of the employer all grievances among the personnel over the implementation of both the statutory regulations governing work and the clauses of collective agreements (32). The personnel delegates are the employee representatives who are especially empowered to present the grievances of the employees. The grievances presented by the personnel delegates in the meeting with the employer, conducted at least once a month, as well as the employer's answers, must be recorded in a special register by the Labour Inspector (33).

If there is a clear case of a breach of a legal or administrative regulation, personnel delegates can initiate proceedings of the Labour Inspector against the employer (34). Although personnel delegates are only allowed to base their demands on existing legal rules, in practise they base

30) Rojot 1987: 77.

31) Reynaud 1975: 243: "Pour le plupart de salariés, le délégué et le syndicat sont une seule et même chose, et, comme il est fréquent qu'en fait délégué et responsable syndical ne fassent qu'un, la confusion est normale et permanente."

32) L. 422-1, al. 1 Code du Travail.

33) Rojot 1987: 77.

34) See Dubois and Halpern 1988: 416.

their demands also on customary conditions of the establishment. Meetings with the employer are also used as a sounding board for grievances that fall well outside the strict scope of their permitted activities (35). Grievances over pay and other working conditions are the main complaints which are handled by personnel delegates. However, disciplinary or dismissal issues of individual employees do not fall into the domain of responsibility of delegates.

The number of delegates depends on the size of the enterprise. At present, one delegate can be elected if there are more than 10 employees. The number of delegates rises with the number of employees. There are, for example, nine delegates if there are more than 500 employees, and an additional delegate for each 250 employees above 1,000 (36). Each delegate is entitled to devote 15 hours of paid working time per month to his or her duties as delegates. The delegates are allowed to display their information within the company (affichage); the employer, however, can veto the bill-posting.

The issues which delegates raise with management concern wage demands relating to individuals and small groups, social facilities, work organization, and safety and health conditions. On these issues management in general adopts the "strategy of arms' length bargaining" (37), accepting the demands of delegates in only a minority of cases. However, since 1982 the position of the delegates has been strengthened by law. If no enterprise committee exists, the personnel delegates substitute for this committee in all its functions.

35) Gallie 1978: 152.

36) See Javillier 1990: 314-315.

37) Batestone 1979: 11-12.

The Enterprise Committee (Le Comité d'entreprise)

Like the personnel delegates the employee members of the enterprise committee are elected from lists of candidates provided by the unions. They serve two year terms. There have to be at least 50 employees in the enterprise to elect a minimum of three enterprise committee members. The maximum number of enterprise committee members is now fifteen in companies with more than 10,000 employees. The enterprise committee is composed of both employee and management representatives. The head of the company (the patron) is the president of the committee.

The enterprise committee is called a body of "triple représentation" because it is composed of employer representatives, elected employee representatives, and union representatives (38). It has legally guaranteed lee-way for self-regulation. L. 431-6, al. 2 allows the committee to adopt a "règlement intérieur" which also regulates the election of a secretary for the preparation and execution of its decisions (39).

The enterprise committee meets at least once a month. Each enterprise committee member is entitled to devote 20 hours paid working time per month to his duties as enterprise committee member and he enjoys special protection against dismissal.

The first comité d'entreprise was established by the ordinance of 22 February 1945, and afterwards regulated by the Law of 16 May 1946. If an enterprise consists of more than one establishment a committee must be created for each different establishment having the same powers and operations exercised by the enterprise committee. When separate establishment committees exist, a separate enterprise committee must be constituted. Since the Law of

38) Lyon-Caen and Pélissier 1988: 819.

39) Javillier 1990: 347.

23 December 1982 special powers are given to Committees on Safety, Health, and Working Conditions. The formal conditions (election etc.) are similar to the enterprise committee, with the exception that employee representatives are in a majority in these committees (40).

Unlike the *délégués* which handle grievances, the enterprise committee is designed to be a forum of cooperation rather than an adversary to management. The legally prescribed task of the enterprise committee is twofold. First, the committee must inform and consult with management over company affairs and the running of the enterprise. Second, enterprise committees administer the company's social welfare provisions for its personnel.

To fulfill the second task, the employer is obliged under French law to supply the committee with a grant over which this body has virtually total discretion. Although employers are only required to grant a certain legal minimum, empirical research found employers to be rather generous (41). However, consultation with the enterprise committee before decision-making was less favoured by French management. Because of an unclear legal definition of "consultation", with only marginal clarification by the Law of 18 June 1966, enterprise committees feel that management is constantly devaluing the concept of consultation, either by by-passing the committee completely or by starving it of the information it needs. Thus enterprise committees are barely informed and rarely consulted (42). Except for social matters this organ of collaboration is considered at best inefficient and is, unfortunately, not moving from consultation to negotiation (43). Insofar as enterprise committees can be said to "handle" claims, they are only

40) Despax and Rojot 1987: 203-209.

41) Gallie 1978: 154: "By all accounts the Committees were fairly prosperous and they organised a wide range of activities."

42) Gallie 1978: 154-6. Also Delamotte 1962.

43) Reynaud 1975: 242.

concerned with collective disputes. They are not directly involved in processing individual grievances.

Since the reform of dismissal law by the Law of 30 December 1986 both the enterprise committee and the personnel delegates have gained responsibility for handling economically motivated dismissals of two or more employees. In these cases the employer has to inform the personnel delegates, if the company has more than 10 but less than 50 employees. In larger companies he has to inform the enterprise committee. However, neither the delegates nor the committee have joint decision-making power. They only have a right to comment on the dismissals. The penalties for procedural negligence on the part of the employer are relatively mild (44). An individual employee can file a tort claim against the employer but he has to present evidence on his personal damages which result directly from the employer's neglect to consult the delegates or the enterprise committee.

The Union Section (La Section syndicale d'entreprise)

Since 27 December 1968, in the aftermath of the events of May 1968, unions have the right to their own delegates in the factory. There have to be at least 50 employees in the enterprise. The number of delegates ranges from one union delegate in companies with less than 1,000 employees to a maximum of four delegates in companies with more than 6,000 employees. These delegates are not elected but designated by their respective unions. They are allowed to devote 15 hours of paid working time to their duties as union delegates.

Unions and management differ in their interpretations of the intentions of the law on union sections. Whereas

44) Between FF 1300 and FF 2500. See Art. R. 362-1, al. 2 Code du Travail. See Keller 1989: 38.

management in general does not view these institutions as a major change in the system because of the unspecific wording of the statute, the unions often feel that the elected bodies now only play a secondary role while the unions take over discussions with management (45). However, management and unions agree that the new union rights should lead to more negotiation at the company level, perhaps by-passing older Central Company Committees (46). In 1973 only 40 per cent of the enterprises with more than 50 employees had union sections. Now 94 per cent of the enterprises with more than 1,000 employees do (47).

The law is rather vague and unspecified about the task of union sections in the enterprise. It only states "représentation des intérêts matériels et moraux de ses membres" (48). Thus it depends largely on the behaviour and relation of management and union sections what role the union section will play at the shop floor. There are three options: union sections may be "super-delegates" in grievance handling, replace the enterprise committee in consultation and negotiation with management, or perform separate tasks from the delegates and the enterprise committee. Only the third option avoids competition with the other two bodies. The union sections are a potential for creating a system for work place industrial relations. They have been active in concluding company agreements on working conditions (49).

The representatives serving in an official capacity in one of the three bodies, enjoy special employment protection. This protection extends not only to the elected delegates and union delegates but also to candidates for election after their candidature is known, and even to

45) Gallie 1978: 156.

46) Gallie 1978: 162.

47) Reynaud 1975: 248.

48) Art. L. 412-6 Code du Travail.

49) See Javillier 1990: 451.

employees who have requested elections (50). Since the Law of 28 October 1982 these employees cannot be dismissed without consultation and advice of the comité d'entreprise and the authorization of the Labour Inspector. A later approval of the inspector is not allowed, so any dismissal is void without prior authorization. This protection lasts not only during the mandate of the elected representatives but for six months after its expiration.

For a long time the most distinct characteristic of labour dispute processing in France was the high degree of direct state intervention in shop floor disputes. This external third party intervention is carried out by a separate state agency, the Labour Inspector (inspecteur du travail). He has the right of free access to all enterprises at any time, without warning and without employer interference.

Traditionally the Labour Inspector was responsible for supervision of health and safety standards. The dominant part of most inspectors' work is now labour relations. It has been reported that the French Labour Inspector spends only 15 to 25 percent of his working time on these matters (51). The Law of 23 December 1982 significantly enhanced the rights of employees to involve Labour Inspectors in safety and health questions. Also in 1982 the Law on 'Liberties of Workers Within Enterprises' empowered Labour Inspectors to direct employers to withdraw shop rules if these work rules deal with other than three subjects: health and safety, discipline, and employee rights in disciplinary proceedings.

The inspector's main role is to ensure compliance with labour laws at the work place. The Labour Inspector has in general four powers:

50) Despax and Rojot 1987: 166-168.

51) Campbell 1986: 50.

- control power over working conditions;
- decision-making power in certain dismissal cases, which was eliminated in 1986;
- negotiation and conciliation powers in collective labour conflicts; and
- advisory powers on social matters.

In 1982, the Labour Inspectorate of the whole of France reported that it 'controlled' 1,053,173 establishments with 12,231,182 employees; Labour Inspectors visited 330,222 establishments. 'Decisions' on dismissals for economic reasons were made in 86,531 cases, and on the dismissal of a worker representative in 6,751 cases. 'Negotiation' and 'conciliation' of collective labour disputes occurred in 4,867 conflicts. And 'advice' on social matters was given during 824,128 visits in 1982 (52).

During the 1980s the concepts and politics of external regulations of company affairs through state administration changed significantly. As a result of deregulation measures and of the implementation of European law, the influence of the Labour Inspector was significantly limited. In particular in dismissal law the powers of the Labour Inspector have been restricted and replaced by consultation rights of elected employee representatives. Until the middle of the 1980s the intervention powers of the Labour Inspectors created an advanced filter system in France for the processing of grievances and dismissals. It was designed to prevent dismissals through early participation of external decision-makers. The Labour Inspector had to approve dismissals for economic reasons and dismissals of specially protected employees. This procedure, however, was abolished by the Law of 30 December 1986.

Nevertheless, the Labour Inspector still plays a significant role in French industrial relations. He is an important advisor to employees and their representatives. Jacques Rojot describes his informal duties:

52) *Liaisons sociales* 1986a: 109.

"The labor inspector may play an informal role in the resolution of shop floor disputes, even though he has no legal power to settle grievances or strikes per se. For example, if an employee inquires about a managerial action taken toward him, the labor inspector will typically instruct the employee as to his legal rights and actions. He may also simply telephone or write the employer to suggest a solution, a middle course, or a modification of the decision. The parties often call upon the labor inspector to informally mediate a strike, even though this role is not granted him by law. Obviously, much depends upon the nature of the relationship between the labor inspector, the employer, and the employees". (53)

The law concerning the Labour Inspector was never considered to be an integral part of French labour law. In fact, through decisions of the higher courts French labour law has adopted a view of strict separation of laws related to the actions of the administrative Labour Inspector from those related to the contract of employment. The employer might be penalized by the Labour Inspector, but this has only an indirect legal effect on the dismissal and the proceedings which end up in the labour court (54).

In summarizing the system of grievance procedure in France it has to be pointed out that compulsory grievance procedures do not exist. Personnel delegates may voice grievances to the employer. However, employees are not protected by these representatives. Although this can also be seen as a right to retain the ability to present grievances individually to the employer, it also means that there are no regulations on dismissals which provide for a participation of collective actors in individual employment conflicts. Personnel delegates offer only an option to employees to channel the grievance without participation in the decision-making on the grievance.

53) Rojot 1987: 76.

54) Napier et al. 1982.

The situation has changed, however, since the beginning of the 1970s when the labour lawyer Xavier Blanc-Jouvain characterized the French situation as follows:

"In contrast to other countries, labour disputes in France are never settled within the enterprise. Internal organizations representing workers have only limited powers; they may promote voluntary settlement of a grievance or act as a screening agency, but they have no decision-making powers and cannot really take part in the final settlement of a labor dispute. Such a settlement, in fact, always implies the intervention of an authority external to the enterprise - judge, state official, or private person. Labor unions, likewise, play a minor role in the settlement of labor disputes, at least at the company level. Union participation is more or less insignificant because of the principles that govern union activities in France - union pluralism and the rule that unions can represent members only - and because settlement procedures are usually prescribed by statutory law rather than by collective agreement." (55)

In a comparative study of the institutional system governing workplace industrial relations in France and Great Britain, Duncan Gallie described in 1978 the consequences of the lack of formal company procedures in France. In his comparison of working conditions in four factories of a multi-national oil company, of which two were located in France and two in Great Britain, he generally found that whereas "British workers were satisfied with the basic form of the institutionalized mechanisms of negotiation that had been established" the French workers, on the other hand, "appeared to be fairly deeply alienated from the system of authority that prevailed in the enterprise. They felt that they were confronted by a highly centralized form of management that remained sovereign over the entire field of decision-making. They regarded the institutions of participation provided by the law as largely a façade, and they tended to reject the idea that the discussion that did take place between management and their representatives even

55) Blanc-Jouvain 1971: 13.

amounted to consultation. The predominant feeling was one of powerlessness." (56)

However, there are remarkable trends in establishing a system of workplace industrial relations. The enterprise committee and the union section are institutions which now operate in the framework of a rudimentary company constitution. They are collective interaction systems which have developed into active institutions at the plant or company level. Within their organizational logic they serve collective interests rather than protect individual employees.

The system of dismissal protection divides employees on the shop floor into two categories: employee representatives attached to the collective interest bodies and other employees. Accordingly separate procedures exist and only the former enjoy effective dismissal protection. At least with respect to the category of 'protected employees', the general statement of Blanc-Jouvain and Gallie that France lacks an effective labour dispute resolution system at the shop floor must be modified. This group of employees has achieved an exceptionally strong form of preventive protection and cannot be called powerless.

United States

In principle the U.S. approach towards labour dispute resolution on the shop floor (but only to a minor degree at the national level) is the direct opposite of the French state interventionist approach. Industrial relations policies in the U.S. have adopted a system of grievance procedures which privatize conflict resolution. These procedures at company level perform functions, in particular

56) Gallie 1978: 145.

regarding dismissal protection, which are covered by public institutions in other countries (57). The U.S. grievance procedures are the product of decentralized collective bargaining. Thus the basis for rules and procedures at the shop floor is contractual and not constitutional.

Since the New Deal Wagner Act of 1935, and with the post-World War II laws on trade unions (58), the federal government has taken an active interest in labour conflict resolution through industrial relations self-regulation which is also supported at the state level (59). This reliance on self-regulation has prevented the U.S. policy-makers from adopting a comprehensive institutional system of labour dispute resolution by statute. Only in a few exceptional cases does the state offer assistance or intervene in industrial relations matters.

The preference for labour conflict resolution on a private basis is expressed by statute. Section 203 (d) of the Labor Management Relations, or Taft-Hartley, Act (LMRA) of 1947 states:

"Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

The "method agreed upon by the parties" is usually known as "grievance procedure" ending with arbitration. It is not a statute but a collective bargaining agreement that defines how the grievance procedure works and how a grievance is defined. The political system has successfully instrumentalized self-regulatory mechanisms for labour conflict resolution purposes. Over 95 percent of all

57) See Hanami and Monat 1985. Also Rogowski 1983.

58) Taft-Hartley Act of 1947 and Landrum-Griffin Act of 1959.

59) Goldman 1983.

collective bargaining agreements in the private sector analyzed by the Department of Labor during the 1980s contain sections on a grievance procedure (60).

This system of industrial self-regulation through grievance procedures and private arbitration predates the labour legislation of the 1930s. It was mentioned in the Industrial Commission Report of 1902, and prior to World War II grievance procedures ending in binding arbitration were common in the clothing and coal mining industries (61). Grievance arbitration became a common practice only after the introduction of legal regulation of labour. "Driving forces" in the constitution of the system have been: "New Deal Legislation, the policies of the World War II War Labor Board and the views of the Board's administrators who thereafter moved on to private positions as leading scholars, mediators, and arbitrators." (62) In addition to the War Labor Board's arbitrators (63), the impact of Taylorism and similar methods of work organization are held responsible for the conscious decision of the American legislator for a pluralist and abstentionist industrial relations policy after World War II which favors private grievance arbitration over labour courts (64).

Grievances are related to both individual labour conflicts, e.g. dismissal, grouping or absenteeism of an individual worker, and to collective matters, i.e. rights of a group of workers or the shop steward's rights (65). The grievance procedure contains a strong "collective element",

60) Reported in Aaron 1985: 344.

61) Kochan 1980: 387; Fleming 1965.

62) Kochan, McKersie and Katz 1984, 3. See also Kuhn 1961, ch. 1.

63) See the interview with Paul Prasow on his training as an arbitrator on the War Labor Board. As many of the other oldtimer arbitrators he was a student of Professor George Taylor who, when he became the Vice-Chairman of the War Labor Board in 1942, took his students to serve as arbitrators. Prasow and Peters 1983, ch. 17.

64) See Stone 1981.

65) See Elkouri and Elkouri 1973: 117-120.

insofar as the formal procedure in many cases can only be initiated by union officials, i.e. by shop stewards after the approval of the union grievance committee. In these situations the employee has to transfer the conflict at an early stage to the collective parties. The individual "claim" is transformed substantively to become a grievance for the grievance procedure. After the transformation the union 'owns' the grievance. For the grievant much depends on not being "in bad favour with the exclusive bargaining representative" (66). American labour law paid special attention to this problem and developed in legal doctrine a so-called duty of fair representation (67).

Grievance procedures follow similar patterns of contacts between unions and management in a negotiation process. Grievance procedures which are laid down in a collective bargaining agreement typically consist of three to five steps of contacts, each on a higher level of the company hierarchy. An example (68) would be that:

- (1) the employee contacts the supervisor or foreman and the shop steward,
- (2) the chief steward meets the division manager,
- (3) the union's grievance chairman meets the Labor Relations Director,
- (4) the main grievance committee meets with the Company President, and
- (5) grievance arbitration.

80 per cent of collective bargaining agreements contain special clauses for the processing of "discharge cases". In these cases the grievance procedure might be shortened, starting at the third step of the procedure after the union has been informed and has decided to file a written

66) Aaron 1985: 350.

67) See *Vaca vs. Sipes* 386 U.S. 171 (1967).

68) See St. Antoine 1984: 266. Freeman and Medoff 1984, 105/5 mention a four-step-procedure as average for grievance procedures in the United States.

grievance because of "unjust discharge or suspension" (69). If an industrial relations department exists within the company, the steps before the grievance procedure reaches the industrial relations officer are thought to be largely irrelevant. The grievance is delegated to the industrial relations officer who, in fact, acts like a "petty arbitrator", hearing both union officials and personnel or other parts of management. The hearing before an external arbitrator becomes the appeal of the industrial relations officer's decision. Grievance procedures can vary in the time lapse allowed for written responses. "To improve promptness one agreement may require written answers to grievances within twenty four hours; another, within ten days." (70)

Arbitration hearings are held before a single impartial "ad hoc" arbitrator are by far the most common (71). In some industries tripartite arbitration boards exist which are composed of a neutral arbitrator and an equal number of representatives from labour and management. In the steel industry, the automobile industry, and the aircraft industry one occasionally finds permanent arbitrators; the term 'permanent' can be misleading, however, because "the unquestioned right of either party to dismiss the arbitrator at any time, for any reason or no reason, is widely regarded by all participants as one of the great strengths and safety valves of the system." (72)

In ad hoc arbitration the parties choose an arbitrator each time a new case is submitted. The arbitrator is selected from lists supplied upon request by the regional offices of the official Federal Mediation and Conciliation Service (FMCS), created by the "Labor Management Relations

69) See the description and analysis of a discharge grievance procedure in Rogowski 1983b.

70) Kuhn 1961: 7 on the basis of 20 plants in 9 industries.

71) St. Antoine 1984: 268.

72) Aaron 1985: 346.

Act" in 1947, or by the private American Arbitration Association (AAA). These lists usually contain an uneven number of three to seven names of arbitrators. The parties choose an arbitrator through negative selection by striking alternately names from these lists until the name of one arbitrator remains (73). Some states offer special arbitration services; the Wisconsin Employment Relations Commission (WERC), for example, offers the service of public arbitrators without charge. Arbitrators chosen from FMCS or AAA lists have to be paid by the parties, usually on an hourly basis.

Arbitration hearings take place on the premises of the plant or in a nearby "neutral" hotel suite. In conflicts with high stakes, i.e., where an amount of money is involved which both parties consider significant, lawyers usually act on behalf of each side, and union and management representatives become expert witnesses.

The overall characteristic of grievance arbitration lies in its private character. Located at the plant level, there is a certain amount of voluntary decision-making by the parties in choosing their arbitrator and in complying with awards and the rules of a private arbitrator. Arbitration awards are said to have effect on management because they set "rules for management interpretation and administration of the agreement" (74). A few points can be made in assessing the U.S. system of shop floor rule-making through grievance handling. These remarks relate to the adversary nature of the procedure, the quasi-judicial nature of arbitration, costs, delay and the nature of grievance arbitration, grievance tactics and enforceability of awards, the profession of arbitrators, the rate of grievances, and non-union grievance procedures.

73) Goldman 1983: 321/2.

74) Phelps 1959: 11.

The adversary nature of the procedure.

Company grievance procedures are normally a product of collective bargaining of unions and management. In fact, they are the institutionalized version of collective bargaining; thus they are in many ways also characterized by what has been called the adversarial principle of American industrial relations (75). Furthermore the general adversarial nature of American industrial relations is reinforced when grievance arbitration adopts judicial measures. Because the leading principle in American court hearings is also adversariness, grievance procedures and grievance arbitration move away from joint regulation and decision-making when juridification increases. However, unions and management are said to have a congruent interest in maintaining the grievance arbitration system at the same time that they pursue adversarial power-price positions. In analyzing this "dialectic" J. Barbash has blamed the attitude of adversariness as an excuse for not openly taking over responsibility: "... arbitration serves a scapegoat purpose which permits both sides to acquiesce in unpopular but necessary decisions by blaming the arbitrator." (76)

The quasi-judicial nature of arbitration.

The increasing similarity between the arbitral and the judicial procedure has been criticized as unnecessary juridification of arbitration. However, the 'shift from consensus arbitration to judicial arbitration' has been considered an inevitable result of unionization of mass production industries and the subsequent inclusion of increasingly more detailed and specific matters of working

75) Barbash 1984: 101 "The adversarial relationship has been normalised through due process methods like grievance arbitration." See also Kochan, Katz and McKersie 1986: 84.

76) Ibid: 95.

conditions in collective bargaining agreements (77). Since the end of WW II arbitration awards have been systematically collected and published, first by the 'Bureau of National Affairs' and later by the 'Commerce Clearing House'. From these publications a form of precedent and stare decisions have evolved which are comparable to their counterparts in the ordinary judiciary (78). In addition, judicial arbitration is characterized by the fact that the procedure of the arbitration hearing is increasingly governed by due process considerations.

The adversary and quasi-judicial structure of grievance arbitration requires skills on both sides to master the formalities. Knowledge of the procedural requirements, as well as the substantive rights under the collective agreement, are essential. In addition grievance representatives must be familiar with previous arbitration awards. Thus professionalization and specialization on both sides is almost inevitable.

The involvement of professional lawyers fosters the trend towards quasi-judicial proceedings: "exhibits" are presented, witnesses are cross-examined, and opening and closing statements on the case are made. The function of the arbitrator also becomes quasi-judicial. He conducts the hearing like an American judge, i.e. listening and supervising the procedure through granting objections, controlling the written record and taking oaths. Arbitrators rarely "lead" the case; this is left to the legal representatives or the parties themselves. The participants adhere to the adversary principle which also governs normal judicial proceedings. There may be plant visits by the arbitrator, but arbitrators usually are not

77) Prasow and Peters 1983: 13-15.

78) The major selection of published arbitration awards are Labor Arbitration Reports, published by the Bureau of National Affairs, and the American Labor Arbitration Awards, published by a private publishing house (Prentice-Hall).

informed about any details of the case before the hearing. "For this reason, ad hoc arbitrators almost never undertake to mediate a case." (79) The lawyers occasionally are permitted to send posthearing briefs to the arbitrators, "to clear some points of evidence". This seems an effective instrument to influence the award.

Costs, delays and the nature of grievance arbitration.

There is widespread concern about costs and delays in the grievance procedure and in arbitration. J. Zalusky reported that the average time required to process a case through arbitration in 1975 was 223 days (= 7 and 1/2 months) (80). St. Antoine reports in 1984 that "a normal case with a one-day hearing costs a union \$ 2,200; management will usually pay more" (81). Attempts to reduce costs and delays often aim at an increase in informalism. Programs for oral resolution of grievances have been developed; the introduction of time limits are designed to reduce delays at various steps of the procedure; and a procedure known as "expedited arbitration" aims at speeding up the process (82).

As a process of dispute handling, grievance arbitration is more than impartial adjudication. James Kuhn has argued that the procedures themselves, i.e., the meetings and hearings, may be as important to the employees as "impartial grievance judgments": "... these procedures both give the workers an opportunity to express themselves and also require the directors of their work to hear and to consider their problems seriously." (83)

79) Aaron 1985: 346.

80) Zalusky 1976: 1.

81) St. Antoine 1984: 268.

82) Kochan 1980: 398.

83) Kuhn 1961: 23.

Grievance tactics and enforceability of awards.

When industrial relations managers and special union grievance representatives control grievance handling, they often develop their own strategies and tactics. As a result of the control of grievance representatives over grievance handling, phenomena such as the "stock-piling" of grievances occur (84). The logic behind this tactic is that union grievance representatives often assume that the overall success of grievances increase when unions appear strong. And their bargaining power is believed to be stronger when they can represent a group of grievances at the same time. This tactic can work to the detriment of the individual employee who is interested in fair representation and speedy conflict resolution of the single case. From an individual rights perspective, maintenance of long-term relations with management creates a barrier to the enforcement of the rights of individual employees. Thus, although the system depends on the support of the collective parties, a differentiation in the handling of individual and collective conflicts seems necessary.

A strength of this grievance arbitration is without doubt the easy enforceability of awards. A grievant found to have been unjustly dismissed is almost always reinstated with back pay and without loss of seniority rights, as empirical studies have shown (85). Based on this fact, Getman (86) favours American-style arbitration over labour courts because it enhances in general the acceptance of awards, and conflicts are more often finally solved. This view is not shared by all participants. Judge Hays has strongly favoured a reform in the direction of full-blown labour courts. His concerns lie with due process rights and visibility of the conflict in a public forum (87).

84) Kochan, Katz and McKersie 1986: 85.

85) Holly 1957 and Adams 1978.

86) Getman 1979: 920ff.

87) Hays 1966.

The profession of arbitrators.

Most arbitrators lack formal industrial relations experience; they tend to be established academics in law or economics or practicing lawyers of repute (88). The recruitment of young arbitrators creates special problems, since the voluntary nature of the negative selection process of ad hoc arbitrators favours 'mainline arbitrators' (89). This system offers no clear career pattern for newcomers. It erects several barriers to inexperienced arbitrators being selected by the normally reluctant parties. Thus most arbitrators remain so-called 'fringe arbitrators'. "It is estimated that 90 per cent of today's cases are being heard by 10 per cent of the available arbitrators." (90)

The arbitrators try to improve their status as a group. They have organized in a rather elitist association, the National Academy of Arbitrators. Membership in this organization is gained only through invitation. The academy has jointly promulgated with FMCS and AAA a "Code of Professional Responsibilities for Arbitrators of Labor-Management Disputes" (91).

The rate of grievances.

The kind of cases that may be handled in the American grievance procedure are in principle defined by the collective bargaining agreement. The agreement often contains a clause on the scope of acceptable grievances. However, the practise of grievance handling depends only indirectly on the written agreement. Often grievances are accepted in the procedure which are only vaguely related to the collective bargaining agreement (92).

88) Getman 1979: 930.

89) Prasow and Peters 1983: 352-361.

90) St. Antoine 1984: 269.

91) Goldman 1983: 325.

92) Elkouri and Elkouri 1973: 114-117.

Industrial relations research offers some insight for an explanation of the rate of grievances, i.e. the number of claims "transformed" into grievances and the reasons for initiating grievances. This research indicates, for example, that a high rate of change in technology increases the rate of grievances (93). Other research emphasizes that collective bargaining which is related to "fractional" or informal bargaining with the supervisor to modify or ignore provisions of the agreement is continued in grievance procedures (94).

To what extent the use of grievance procedures has a negative effect on productivity is a standard topic in labour economics and industrial relations research. Some argue, on the basis of a relatively small number of case studies, that high grievance rates have a negative effect on productivity (95); other researchers insist that a zero rate of grievances also has negative effects and is less than optimal for productivity (96).

Non-union grievance procedures.

Grievance procedures are no longer characteristic only of unionized companies. Institutionalized conflict resolution can also be found in so-called "alternative nonunion human resource management systems". Kochan et al. consider these systems to be leading "pattern setters" and more innovative than collectively bargained systems (97). Indeed, new types of consultation are related to new forms of bargaining, among which so-called "concession" bargaining, in which unions agree to lower wages in order to save jobs becomes possible.

93) Kuhn 1961: 44/45. Peach and Livernash 1974 and Slichter,

94) Kochan 1980: 391-394.

95) Freeman and Medoff 1984: 76-9; Katz, Kochan and Keefe 1988: Ichniowski 1986.

96) Kleiner, Nickelsburg and Pilarski 1989.

97) Kochan, McKersie and Katz 1984, 6ff. and 1986: 93-108.

Great Britain

Three basic three types of individual grievance processing exist in Britain which are related to different types of procedures: negotiation in dispute procedures at the company level; conciliation efforts by a separate agency (ACAS); and adjudication by industrial tribunals. In this section company dispute procedures and ACAS conciliation are discussed; industrial tribunals are introduced in the chapter on labour courts.

Company dispute procedures

Company dispute procedures are both an old and a new phenomenon in British industrial relations. They are old because dispute procedures date back to the last century when collective bargaining was introduced. And they are new because many companies have introduced dispute procedures for the first time only in the 1970s and 1980s.

Britain has basically two forms of company dispute procedures. The first type is linked to shop steward activities and pay bargaining at the plant or company level. The second type is basically the requirement for employers to follow certain procedural steps in taking disciplinary or dismissal actions against employees.

The first type is related to the voluntarist tradition of joint regulations of job issues between unions and employers. Voluntarism resulted in a scattered picture and left several areas in British industrial relations unregulated. Indeed, workplace industrial relations were not generally covered by voluntary dispute procedures (98). Medium-sized and small-sized companies were largely exempted from independent shop floor regulation. Even in larger

98) See Anderman 1971.

companies the formal system of procedures, usually established at industry level, was counterbalanced by an informal system at the company level. Nevertheless, the tradition of consultation and collective communication in joint procedures or committees at the workplace and at higher levels has been continuously supported during the 1970s and 1980s by statutory labour law. In 1984 joint consultative committees were established in 34 per cent of the manufacturing companies (99).

Hugh Clegg, a major advocate of the voluntarist system and a prominent member of the Donovan Commission, calls voluntary dispute procedures "a service which employers' associations provide for their members" (100). He argues from the fact that the "old" dispute procedures were related to British collective bargaining conducted at the regional or industry level. Industry collective agreements encounter special application or "interpretation" problems with respect to a particular plant or company. These "interpretation conflicts" (101) were formerly handled in joint committees established by the collective agreement. Industrial relations research has described the limited role of this service of employers' associations to their members. Particular attention was given to a critical assessment of the engineering dispute procedure (102).

According to the Donovan Commission these joint procedures created the formal system which was undermined by the informal system of domestic disputes arising within factories. Domestic disputes often involved shop stewards who were and are called the "motor" of workplace industrial

99) Millward and Stevens 1984: 138.

100) Clegg 1979: 84.

101) Clegg distinguishes interpretation conflicts from "domestic conflicts" at plant level.

102) Clegg 1979: 89 mentions that "no other procedure in Britain has come in for anything like the volume of criticism which was directed at the former engineering procedure". See for example the criticism of Hyman 1972.

relations in Britain (103). Shop stewards traditionally represent a certain work group unequivocally. They are organizationally and ideologically relatively independent of the official trade union movement and they develop relationships with lower level management, i.e. foremen and supervisors, and engage in wage-bargaining. However, shop stewards are no longer outside the formal system. A survey conducted in 1978 found that they "are no longer divorced from formal negotiating arrangements in the way that the Donovan Commission had criticized. The formal arrangements have in the main been adapted to include them and the concomitant rise of single-employer bargaining has increasingly made stewards into the principal negotiators and guarantors of clear-cut factory agreements and procedures." (104).

A system of "piecework bargaining" (105) evolved at the plant level, and shop stewards have become procedurally involved in grievance handling over the years. Terry, predicting an increase of informalism through the imposition of formal procedures at the plant level in the middle of the 1970s (106), convincingly argues that the motor for joint regulation of job issues was not so much willingness or unwillingness on the side of the shop stewards but managerial strategies of incorporation (107).

The Donovan report found the main "root of evil" in Britain in 1968 to be unofficial strikes at the plant level which resulted both from the non-binding legal character of collective bargaining agreements and from the "absence of speedy, clear and effective disputes procedures" (108), especially for dismissal and disciplinary issues. Thus the

103) Terry 1983.

104) Brown 1981: 79.

105) Brown 1973.

106) Terry 1977.

107) See Terry 1983: 85-91. See also McCarthy 1966: 27-29; Clegg 1979: 235.

108) Donovan Report 1968, par. 475, p. 127/8.

report proposed to introduce such procedures with government support and placed high hopes in the recovery of British industrial relations through an introduction of procedures.

However, the type of procedure adopted by the Donovan Commission, and the employment policies following the Commission's proposals, differ significantly from joint procedures. The policy and the new legislation after Donovan were mainly concerned with protection of the employees from arbitrary employer decisions. A major instrument was the issuing of a Code of Practice in 1971 urging employers to formalize procedures. The Code of Practice was revised and enlarged in 1977 by the government institution, "Advisory, Conciliation, and Arbitration Service" (ACAS), which was created among other reasons, to facilitate the implementation of procedures at the company level.

ACAS developed as an institution out of the activities performed by the Department of Employment. According to the recommendations of the Donovan Commission in 1968, the Department of Employment engaged and trained several officers in order to achieve conciliated settlements. ACAS officers are civil servants. They work in offices in Scotland, Wales, seven English regions, and in the London head office. "The staff of ACAS are part of the 'DE group'. Consequently their career progression is not simply within ACAS" (109). They might be transferred to the Manpower Services Commission or the DE itself.

ACAS is organizationally independent of the British labour judiciary. Along with its dispute resolution function ACAS performs several other functions which are aimed at improving industrial relations. ACAS offers third party intervention through advice on workplace industrial

109) Dickens 1987: 111.

relations and conciliation, mediation or arbitration of collective conflicts.

In this respect ACAS has been quite successful. Industrial relations research discovered that over a period of twenty years procedures for disputes about dismissal or discipline grew in extent from less than 20 per cent to 90 per cent of the manufacturing companies (110).

The 1984 survey by Millward and Stevens shows that 90 per cent of all establishments of the survey had reported the existence of dismissal and disciplinary procedures. In addition, 68 per cent reported procedures for dealing with collective disputes on pay and conditions and 86 per cent reported the existence of individual grievance procedures. Even private establishments with less than 50 employees reported in 1984 a rate of 82 per cent existence of a dismissal and dispute procedure (111).

These British grievance procedures are not so much a product of voluntary industrial relations but rather were established unilaterally by management after the issuing of the mentioned "Code of Practice" by the Department of Employment and by ACAS. "...there was a surprisingly high proportion of (union, R.R.) officials who reported little or no negotiation over the introduction of the procedures, with a third implying that impositions following either no or minimal consultation was the norm in their sector." (112)

The form and magnitude of dispute procedures vary with the size of the company. "In relatively small unionized plants, there may be nothing beyond occasional meetings between the manager and one or two stewards. At the other end of the scale, some large plants have negotiating bodies,

110) See Dickens et al. 1985: 235, Table 8.2. and Millward and Stevens 1986: 170, Table 7.1.

111) Millward and Stevens 1986: 170, Table 7.1 and 1972, Table 7.2.

112) Evans et al. 1985: 96.

dispute procedures, consultative committees, sub-committees, ad hoc committees, joint shop stewards' committees, and shop stewards negotiating committees which rival the arrangements of some major companies in their number and in their calls on manpower." (113) The Code is not mandatory and thus does not replace dispute procedures established through collective agreements.

The ACAS "Code of Practise 1: Disciplinary practice and procedures in employment" (114) outlines the following steps of the procedure:

- Formal oral warning in the case of minor offences, written warning in more serious cases setting out the nature of the offence and the likely consequences of further offences. In either case the individual should be advised that the warning constitutes the first formal stage of the procedure.
- Final written warning which contains a statement on the likelihood of the disciplinary action or dismissal which, however, still allows time for improvement.
- The individual who is going to be disciplined or dismissed is given the opportunity to state his or her case.
- The individual is advised of his rights under the procedure, including the right to be accompanied by a representative.
- Once the final step is taken, i.e. a disciplinary action or dismissal, the individual should have the right to appeal to a higher level of management or appeals body.

ACAS has been criticized for failing to outline a complete procedure and for using rather vague terms. The Code is allegedly tentative in nature (115). Indeed, there is no indication that the Code, which is especially designed as a guide for small and medium-sized establishments, will enhance joint decision-making with worker representatives.

113) Clegg 1979: 230. See also the data on dismissal proceedings in five British plants in Marsh et al. 1981: 140/1.

114) ACAS 1977; a proposed revision of the Code by ACAS was blocked by the government in 1987 because small employers found the revised Code "too formalistic".

115) Wood, Hepple and Johnston 1987: 208.

The Code is not an instrument for promoting industrial democracy.

Although employers are not obliged to adopt the ACAS procedure, there is pressure on them to implement and follow the procedure of the Code. Its impact is felt indirectly. A failure to implement and follow the rules of the Code of Practise is feared by employers because it can be used as evidence in matters upon which the employer has been called to account. This is most notable in dismissal cases which reach the stage of a hearing before the industrial tribunal. In the early 1970s the industrial tribunals, supported by the House of Lords (116), interpreted the reasonableness of a dismissal, i.e. the second legal test after looking into the reasons for the dismissal, by alluding to procedural fairness. A dismissal was automatically considered unfair if the employer did not follow the dispute procedure. This decision-making practise was criticized by small employers as formalistic. Subsequently the decision-making of the industrial tribunals was corrected and a standard was developed to forgive "procedural unfairness", i.e. not following the ACAS procedure, in cases in which the employee "on the balance of probabilities would have been dismissed anyway" (117). However, the ACAS procedure was reinforced by Polkey v. Dayton (118) which overruled British Labour Pump (119).

Research on the "government of the work place" is divided. Strong words have been used to criticize an alleged British industrial disorder which is said to be caused by fractional bargaining leading to a constant

116) Devis & Sons Ltd. v. Atkins [1977] IRCR 314.

117) Wedderburn 1986: 240 commenting on the leading EAT case of British Labour Pump. See also Anderman 1986: 422-4; Dickens et al. 1985: 102/3 and Elias 1981.

118) Polkey v. Dayton Services Ltd [1988] AC 344, [1988] ICR 142.

119) British Labour Pump Ltd. v. Byrne [1979] ICR 347, [1979] IRLR 94

breakdown in the pay system because strong union competition has "spiralled out of control in a war of all against all" (120).

The Conservative governments of the 1980s and the early 1990s view employment protection and labour law measures in general rather as burdens on business. They are no longer seen as necessary devices for the attainment of industrial justice. The two Government White Papers "Lifting the Burden" (121) and "Building Business ... not Barriers" (122) and the Government sponsored Research Paper "Burdens on Business" (123) express this view. Procedures are evaluated according to "deregulatory" parameters if they "promote enterprise and job creation in growth areas such as small firms, self-employment and tourism". Although the era of proceduralism appears to be over, it seems nevertheless highly unlikely that the procedures introduced in the 1970s will be abolished again.

ACAS conciliation

If internal grievance procedures fail, the official Advisory, Conciliation and Arbitration Service (ACAS) can be invoked to handle cases of individual conciliation as well as collective conciliation, arbitration, mediation and investigation cases (124). It is appropriate to include information on these official conciliation attempts in our comparison of company grievance procedures not only because ACAS officers are supposed to contact the parties in dismissal and other individual cases "at the workplace".

It is also justified because ACAS is increasingly instrumentalized directly by the employers. In 1987 almost

120) Maitland 1983: 47.

121) Cmnd. 9571.

122) Cmnd. 9794.

123) HMSO 1985.

124) See Dickens 1987

a third of all ACAS applications (32 per cent) for individual conciliation were referred to ACAS directly by employers who are about to dismiss one or more of their employees, but who wish to do so on agreed terms which will preclude any subsequent tribunal complaint (125). In these cases the industrial tribunals were not invoked. However, even in regular applications with the industrial tribunals the contact with ACAS officers forms a direct part of the dispute resolution process at the company level if the employee wishes to continue to work while the dismissal or disciplinary action is processed in the industrial tribunal system.

Individual conciliation creates the largest component of the ACAS caseload. In 1986 ACAS' individual conciliation officers assisted in 51,431 cases and in 1987 in 40,817 (126). In these cases ACAS officers act independently in their settlement attempts. Individual conciliation by an ACAS officer is automatically initiated by filing a dismissal or other suit with the Central Office of the Industrial Tribunals (COIT). This London office will send copies of the application to both the regional industrial tribunal and the regional ACAS office. ACAS then has about six to ten weeks time to settle the case (127).

Within the regional ACAS office the case is assigned to an individual conciliator who under normal circumstances immediately contacts the parties by phone and arranges visits if this seems appropriate. Conciliators mentioned in conversations with the author that they are rather unhappy about increasing legal representation of the parties during conciliation. It prevents open discussions about the causes of the dispute and possible alternatives to a hearing or a money settlement in agreeable terms. Thus conciliators prefer to talk to the disputants personally.

125) ACAS 1988: 55 and Table 18.

126) ACAS 1987: 81.

127) Wood, Hepple, and Johnston 1987: 205.

The parties are independently contacted by the conciliation officer. As a matter of convenience the officer might start with contacting the defendant and ask him about the possibility of a settlement. It is rare that a party has absolutely clear ideas about possible settlements. In his back and forth reporting of the proposals, the officer is sometimes clearly setting aside the role of the impartial conciliator. If the parties insist he might inform them about published average compensation awards. The line between general information and settlement proposals however becomes rather thin in such moments.

The general attitude is that ACAS conciliation is a means of facilitating autonomous decision-making between the parties at dispute rather than as state intervention. ACAS considers itself as part of the "helping business" (128). ACAS can be characterized as an intermediate institution which organizationally reflects a compromise between self-regulation in industrial relations and the policy goals of the welfare state to provide social protection.

ACAS has encountered 'misunderstandings' with respect to its role in individual conciliation:

" ... there has been evidence over the years that the ACAS role in individual conciliation is sometimes misunderstood. It is not the individual conciliator's responsibility to advance the interests of either party. He must be impartial in his attempts to promote a voluntary settlement." (129)

The ACAS administration makes several attempts to fight these misunderstandings. It has produced a number of

128) The helping attitude of ACAS became apparent to me by phoning the Regional Office in Birmingham during my investigations. The telephone operator ("Aicass, may I help you") sounded like a nurse who tries to convince you that there is a way to relieve you of your problem without harm.

129) ACAS 1983: 37, para. 4.2..

booklets to be distributed by the conciliation officer to the parties at conflict before conciliation starts; these booklets try to explain the impartiality and neutrality of conciliators in a non-technical language.

The contact of the parties by ACAS officers is perceived unavoidably as a form of state intervention and the activity of ACAS officers raises hopes for solutions in a muddled situation. However, the ACAS officer also has social responsibilities. The ACAS Annual Report stresses the responsibility of the ACAS officer to explain to the complainant that he or she relinquishes the right to pursue a claim by industrial tribunal by signing an ACAS conciliated settlement (130).

Although the British system has already developed an impressive system of procedures, the demand for procedural differentiation continues. A discussion has recently started that arbitration "below" industrial tribunals should be installed to relieve the judicial bodies of cases which deserve less formalistic or legalistic treatment (131). So far this idea has not found much acclamation (132). Another discussion suggests that proposals be made to advance industrial tribunals into labour courts (133). It is predicted that the political resistance of the government and the opposition of the legal and economic professions will be too strong to allow further autonomisation of the labour law through full-blown labour courts (134).

British industrial relations research emphasizes that the introduction of the industrial tribunal system has not replaced but stimulated reform of voluntary procedures (135). Official British labour dispute resolution

130) Ibid: 37/8, para. 4.4..

131) Dickens et al. 1985, ch. 9.

132) Justice 1988.

133) Wedderburn 1987: 26.

134) Hepple 1988: 19-21.

135) Dickens 1985: 232-252.

mechanisms are designed to foster collective bargaining and voluntary grievance procedures. This interplay of judicial decision-making and industrial relations procedures in Great Britain can be called a reflexive social and industrial relations policy approach. The idea of reflexive social policy emphasizes a retreat from state interventionism when societal self-regulation is possible. Moreover if the state intervenes, it is rather with procedure than with substantive policy prescriptions. Britain seems to have found over the years such a reflexive balance after some negative experience with procedurally unsatisfactory voluntarism on the one hand and repressive state intervention during the period of the Industrial Relations Act on the other.

Germany

Germany represents the most advanced case of a company constitution independent of collective bargaining between unions and employer associations. The core idea of the company constitution is co-determination of company affairs between elected employee representatives and management. Labour grievance handling in Germany is tied to the structure of co-determination at the enterprise level. Co-determination occurs on two levels in the enterprise, i.e. at the control level in the supervisory board (Aufsichtsrat) and at the shopfloor in form of participation of the works council (Betriebsrat) in certain areas of company decision-making.

The function of the supervisory board is to control the board of directors, i.e. management. The employee representatives share almost a parity of seats with the owners (shareholders) of the company in this board. Co-determination in supervisory boards was first introduced in

Germany immediately after WWII in the coal and steel industry. The employers in these industries offered the unions half of the seats in the supervisory board and, in addition, the position of a "labour director" (Arbeitsdirektor) in the Board of Directors in order to avoid nationalization of their industries as demanded by the unions and the socialist movement at that time. In 1976 this model was introduced in all German companies with more than two thousand employees in which elected representatives of the employees occupy almost half of the seats in the supervisory board (136).

Co-determination at the shopfloor is carried out by the works councils (Betriebsräte) which are statutorily protected under the Works Constitution Act (Betriebsverfassungsgesetz). Works councils are elected by the employees of the enterprise for three years. There must be at least five employees in the enterprise or firm to elect one works councillor. This threshold exempts very small firms from co-determination. The number of works councillors reaches 5 in establishments with more than 20 employees. The number of councillors increases with the size of the company, there being 31 councillors in enterprises with more than 7,000 employees. In enterprises employing more than 9,000, two additional works councillors can be elected for each 2,000 employees (137). In enterprises with more than 300 employees one member of the works council is released from other work for full-time works council activity. The number of those occupied full-time in the works council rises to 11 in enterprises with more than 9,000 employees (138). In a group of companies the Works Constitution Act provides for a conglomerate works council.

136) Mitbestimmungsgesetz of 1976.

137) Sec. 9 of the Works Constitution Act.

138) Sec. 36 of the Works Constitution Act.

Since more than 80 per cent of the works council members in Germany are union members (139) unions actually control the works councils; however, works councils are not union bodies. Works councils represent not only union members but all employees of the enterprise. They lack the right to call a strike or other collective action.

Unions are represented at the enterprise level by bodies of so-called 'men and women of confidence' (Vertrauensleute). The function of these union sections is not defined by statute; it is left to the unions to define the tasks of their sections in the enterprises by internal union regulations (140). There is a special relationship between the union sections and the works council. Unions have the right "to activate, to advise and to control" the works council (141). This dual system of worker representation is seen as beneficial for unions because it releases unions from the responsibility of having to fight for recognition (142) and from having to be fully alert and prepared to go on strike for the purpose of solving ad hoc conflicts over "small and smallest issues" (143). Research has found different types of relationships between works councils and union sections which influence the participation of works council and management (144).

Works councillors enjoy special employment protection. They can only be dismissed for serious reasons (wichtiger Grund) and with the consent of the works council. If the works council refuses to agree to the dismissal of one of its members, the employer has to obtain the consent of the labour court before he can dismiss the works councillor (145). Former works councillors enjoy this special

139) Däubler 1985: 377.

140) Ibid: 529.

141) Ibid: 381-7.

142) Streeck 1979 and 1981.

143) Kittner and Breinlinger 1981: 63/4.

144) Kotthoff 1981.

145) Sec. 103 of the Works Constitution Act.

dismissal protection for one year after the end of their term (146).

Participation of the works council is granted at three levels. First, works councils have full co-determination rights in social matters, including questions concerning enterprise work rules, working time arrangements, vacation plans, safety and health at the work place, the introduction and administration of social facilities and wage methods in the enterprise. Secondly, in economic questions the employer is only required to inform the works council. In case of a planned restructuring of the company which would have negative effects on the work force, management and the works council are required to enter a social plan which documents the settlement of interests (147).

And thirdly, works councils have participation rights in personnel matters. They have to be consulted or heard before any dismissal is carried out. But works councils do not have full co-determination rights in personnel matters. The Works Constitution Act provides for two possible reactions in cases of dismissal: the works council can either oppose or remain silent (148). If the works council does not respond within a week after notification by management the consent of the works council is then stipulated by law.

Recent research shows that the works councils in a majority of dismissal cases do not adequately utilize their limited participation rights. They neither oppose nor remain silent but actively support dismissals (149). This behaviour and attitude of works councils in dismissal situations can partly be explained by a flaw in the law. The opposition of the works council has no direct effect on

146) Sec. 15 of the Dismissal Protection Act.

147) Sec. 111, 112, and 113 of the Works Constitution Act.

148) Sec. 102 of the Works Constitution Act.

149) Höland 1985: 97-183, and especially Tab. 4 on p. 87.

the dismissal decision; it cannot prevent management from pursuing the dismissal. The opposing statement of the works council must be attached to the written dismissal notice, which is handed to the dismissed employee, and may eventually influence the decision of the labour court in favour of the dismissed employee. The employee has to invoke the labour court in any case regardless of whether the works council has opposed or supported the dismissal. The joint search for alternative employment at the shop floor level in this co-determination structure is often not as rigorous as it might be. Occasionally it has been argued that settlement of a dismissal conflict at company level is given up too early in the German system because of a lack of formal procedures (150).

It would be possible to use the existing procedures and develop them into an effective system of employment protection at company level. In particular the procedure for resolving conflicts between the works council and management over the application and interpretation of company agreements could be used to handle individual grievances. The company constitution law provides for an arbitration committee (Einigungsstelle) which is located at company level and forms part of the participatory decision-making and collective bargaining at the plant level. It has a tripartite structure and the "neutral chairman" (151) of the arbitration committee is an active labour court judge. Judicial review of decisions of the arbitration committee is restricted to questions of the arbitral powers of the members of the committee (152).

However, the arbitration committee is so far deliberately not used to handle individual employment conflicts. It has to be said that, although the legal and actual co-determination rights of workers' representatives

150) See Simitis 1978.

151) Sec. 76 (2) of the Works Constitution Act.

152) Gaul 1980: 294; Däubler 1985: 426.

in social, economic and personnel matters are impressive (153), German law does not provide effective procedures to guarantee the unequivocal and fair representation of the grievants and employees threatened with a dismissal. It is possible to analyze the ambivalent logic of collective action. The thesis put forward here is that there exists a structural reason for the works council to engage in trade-offs which is related to the German co-determination system. Participation rights are exercised by employee representatives in order to obtain a conciliatory attitude on the part of management in economic and social matters, in return for a conciliatory attitude on the part of the works council in personnel matters. Works councils must be interested in maintaining a good relationship with management because they want to become involved in the important questions of economic decision-making. The works councils think they will benefit from inactivity in personnel matters in the long run by gaining an influence on decision-making on economic matters.

Moreover, the dismissal of individual employees for reasons of misconduct is often demanded by their colleagues. In these cases the dismissed employees are considered outsiders, belonging to the fringe of the work force in the enterprise, whereas their hostile colleagues form the core of the work force. And this core creates the electorate for the works councillors. Furthermore their reluctant attitude towards dismissal processing rests on a belief that works councils are relieved from looking into dismissal issues because the dismissed can get adequate redress from the labour courts (154).

Disciplinary issues are dealt with separately from dismissal cases in Germany. The operation of company

153) On German co-determination see Säcker 1981 and Runggaldier 1983.

154) On the effects of dismissal law on workplace industrial relations in general see Russig 1983 and Rosenbaum 1981.

disciplinary procedures (Betriebsjustiz) also forms part of the German co-determination system. Company penal codes (Bußordnung) can only be introduced with the consent of the works council. Although the statute on works councils does not mention the administration of the penal code at the company level as a co-determination issue, the Federal Labour Court has explicitly enlarged the co-determination rights of the works council to include works councils in sentencing employees for misconduct (155). It has outlined the structure and the conditions of a disciplinary procedure which is summarized by the leading labour law commentator Schaub (156) as follows:

- an enterprise penal code must exist and be made public to the work force of the enterprise;
- the norms and the penalties must be defined concretely;
- a procedure must be offered in which due process concerns prevail;
- the accused should be given the opportunity of a hearing and legal representatives should be admitted.

In disciplinary actions works councils must consent even to a warning which might result in a penalty. Research indicates that only 29 per cent of the enterprises in West Germany have introduced penal codes (157). Even within these companies the joint procedures or committees are often circumvented by management. Works councils are also reluctant to participate in these procedures if participation only means legitimizing the employer's decision (158).

Since 1972 each employee is given the right to bring grievances to the attention of management or the works council. He or she must be heard and has the right to a fair procedure in which he or she can adequately express the points of concern from a subjective point of view. It is

155) BAG AP 1 to sec. 56 BetrVG Betriebsbuße.

156) Schaub 1987, 235 F II 1 b, p. 1565.

157) Kaiser and Metzger-Pregizer 1976.

158) Däubler 1986: 344.

left to the discretion of the works council whether or not to represent the grievant. There is no obligation for the works council to take up a grievance.

Thus there is a lack of effective procedures in the German case which largely has to do with the peculiar position of works councils. The current law does not preclude more extensive formal procedures. The parties of a company agreement, i.e. the works council and management, have the option of installing a detailed grievance procedure voluntarily. The parties may create a joint grievance committee. Considering the above-mentioned logic of collective action, it comes as no surprise that Manfred Weiss reports that no such committee is known in Germany to date.

"Based on available evidence, there has not been a case of a grievance procedure under which an arbitration committee was asked to decide the grievance. Neither, to my knowledge, is there an agreement which regulates the details of the grievance procedure or establishes a grievance committee. No data are available on the number of cases in which the works council was involved. There is a strong indication that most grievances which do not end up in a law suit, are settled on the shop floor between personnel management and the individual worker without following any formal procedure whatsoever." (159)

The statement by Weiss most clearly expresses the weakness of the German dispute procedure system with respect to the handling of grievances on the shop floor. There is room for the individual employee to engage in informal and direct negotiations with management. However, formal handling of grievances at company level is in the hands of works councils which have to mediate dispute processing along with their other functions. Thus from an early stage in the grievance process the grievants have to turn to adjudication to challenge dismissals. The consequence is that little effort is made at the company level to 'heal'

159) Weiss 1987: 103.

the employment relationship which is in crisis. Once the employee has left the company it is hard to search for a solution which would secure the job, such as finding an alternative occupation in the company.

Concluding Remarks on Company Dispute Procedures

Company grievance or dispute procedures can be defined as "a system of industrial jurisprudence" by which management and the unions can continue collective bargaining and "flexibly apply the general promises of an agreement to specific daily incidents in the shop." (160) Functionally, grievance procedures are designed to keep industrial peace and to avoid industrial action. However procedures are also a means of enhancing self-regulation and co-determination at the workplace.

The political regulation of grievance procedure systems is shaped by the three concerns of: voluntarism, proceduralism, and positive rights. These concerns have clearly dominated the British development. Since the 1960s, British industrial relations have witnessed a general shift from voluntarism to negotiated proceduralism (161) or "bargained corporatism" (162). Until the 1960s a social consensus existed that the role of the state should be minimal. The voluntary system of industrial relations rested on voluntary collective bargaining. Co-partnership or notions of worker control formed no part of the traditional consensus (163). In the aftermath of the 1968 Donovan report and the failure of the 1971 Industrial Relations Act, proceduralism replaced the voluntarist

160) Kuhn 1961: 1.

161) Prigge 1987.

162) Crouch 1982b.

163) Hepple 1986: 43.

consensus in the 1970s. It became the new consensus in labour law and in industrial relations.

In general, the regulations adopted in Britain in the 1970s praised procedures as instruments for integrating voluntarism and state intervention. Industrial relations research triumphantly presented steadily increasing coverage of procedures in British companies. Employers accepted the ACAS Code of Practice. They calculated that these procedures could help in keeping industrial peace. Unions viewed procedures as a mean of achieving formal recognition when they were allowed to take part in their operation. Proceduralism at the company level was thus supported by a general belief in the "management of collective bargaining" (164).

During the 1980s the consensus among the industrial relations actors on proceduralism eroded to some extent in Britain. The Conservative government challenged procedures as an unnecessary burden on business. Labour lawyers, who evaluate proceduralism from a legal perspective (165), also view procedures no longer as goals in themselves, but rather as instruments of implementing and enforcing statutory or other rights. This approach is called the "positive rights" view; it relates the functioning of procedures to the content of decision-making in procedures. From this perspective procedures are criticized as being ineffective because they lack positive rights. Thus to improve the outcome of procedures it is necessary to create positive rights.

The positive rights approach views progress in labour law as a process of facilitating voluntaristic societal self-regulation first by procedures and then by positive rights. Positive rights enlarge the labour law and in fact are the center of an autonomous labour law system.

164) Sisson 1987, ch. 5.

165) See only Hepple 1983.

Grievance procedures therefore form part of the overall machinery of enforcing rights. Grievance procedures as part of the system of dispute resolution are recognized by ACAS and industrial tribunals. It is a functional division of labour between the different procedures which guarantees the enforcement of rights.

The elements of voluntarism, proceduralism, and positive rights can be found in particular constellation in the three other countries under comparison. The U.S. system has experience with voluntarism and proceduralism in an industrial pluralist framework but has not yet reached the stage of introducing positive rights through statutes which apply to all employees. Germany does not lack procedures and rights at the company level but removes dismissal cases at an early stage in the conflict resolution process as not being a further subject of the co-determined self-regulation of the workplace. Similarly there is an early reliance in France on external state intervention through administrators or the labour courts as a result of weak representative bodies and union competition at the company level.

The result of our comparative overview in political terms is that Germany and France need greater emphasis on self-regulation by procedure whereas the U.S. needs positive rights for the work force as a whole. In Britain there is a danger that the potential of proceduralism for joint regulation of the workplace will be undermined by market philosophies demanding more management prerogatives; the industrial tribunals have unfortunately retreated from considerations of procedural fairness in judging the employer behaviour in the dismissal situation.

CHAPTER IV

LABOUR COURTS

A systems theoretical socio-legal understanding of labour courts requires a distinction of levels of analysis with respect to system references. At least four levels can be distinguished. There is the level of the political system, on which the historical processes surrounding the establishment of institutions for labour conflict resolution, and the enforcement of governmental industrial policies which regulate industrial relations through statutory intervention are analyzed. Then there is the judicial system, in which the relationship between labour courts and other parts of the judicial system is an important issue. With respect to the industrial relations system both the impact and the instrumentalization of labour courts can be analyzed. And, lastly, with respect to the systems of labour courts themselves internal factors related to the organization of labour courts have to be considered.

The distinction of system references, i.e., the political system, the industrial relations system, the legal system and the labour court system is especially important for comparative analysis. Comparative labour law rightly claims that a proper comparison of labour conflict resolution systems cannot be confined to organization aspects (1). However, a proper definition of the function of labour judiciaries can also not be confined to an analysis of the industrial relations context alone (2). It has to integrate the studies of the external relations and of the internal structures and processes based on a collection of institutional data in a functional comparative analysis of labour conflict institutions.

1) See Blanpain 1985, referring to Schregle 1979.

2) As Schregle 1981: 27 seems to suggest.

A systems theoretical perspective on judicial institutions places special emphasis on their degrees of autonomy. In this perspective the "function" of labour courts is not only defined by the industrial relations context, but rather a result of both societal definition and of self-definition processes of the judicial institutions themselves. Labour courts are located in the legal system. They have to be understood as legal institutions which reflect the self-regulation of the legal system in the area of labour law. Labour courts are an organizational response inside the legal system to the demands for regulation of industrial relations and employment relationships.

Labour Courts and the Judicial System

Labour courts form part of the judicial system in general. In fact they are the expression of certain trends in the development of national judicial systems. These processes can be described as internal differentiation. Modern litigation theory has been studying differentiation processes of the judicial system for some time. It has provided evidence on trends and developments in legal procedure.

In general such internal procedural differentiation of judicial systems follows after a certain external differentiation from the political system. Niklas Luhmann has described the development of the autonomy of the legal system as differentiation of the judicial system from the legislature which is accompanied by the creation of separate judicial procedures. In this process the legislation becomes responsible for the establishment of programs and the judiciary for the application of programs (3). Differentiation characterizes the further development of

3) See Luhmann 1981, ch. 2 and 1983: 234-242.

judicial systems. It continues inside the judicial system as specialization and innovation in procedural forms. Procedural differentiation of the judicial system occurs thereby in two basic ways:

- the creation of special courts and tribunals and new buffer institutions with quasi-judicial and informal procedures external to, but under the surveillance of, the judicial system;
- new procedures and procedural innovations within judicial and administrative institutions (4).

Special Courts and Prehearing Proceedings

Procedural differentiation of the judicial system is evident in the development of Continental European civil law systems as well as in American and Anglo-Saxon common law systems. "Pre-trial" proceedings, ranging from formal court-annexed conciliation or arbitration proceedings to informal clarifying meetings with the presiding judge, such as plea bargaining or pre-hearing assessment, indicate similar trends of differentiation worldwide. These trends constitute a differentiation of procedures in the front-yards of the general courts and are sometimes called alternatives within the judiciary (5).

In addition differentiation is also present in the form of special courts or tribunals. These are composed of either new types of judiciaries like tribunals and small claims courts or attempts to revive traditional institutions such as the neighbourhood arbitrator (6).

4) See Blankenburg and Rogowski 1983: 134-140.

5) See Blankenburg, Gottwald, Stempel 1982 and Blankenburg, Klaus, Rottleuthner; Rogowski 1980.

6) On the revival of the German Schiedsmann see Röhl 1987.

Differentiation into special courts and pre-judicial proceedings can be seen as functionally equivalent responses to similar sets of new problems. The national or cultural differences in proceedings are due to the differences in legal principles or paradigms governing the different legal systems but not to different problems. Traditionally the principles which shape legal institutions and procedural codes are related to the emphasis that the legal system as a whole and its associated legal training place on the role of judge or lawyer (inquisitorial vs. adversarial model). Similarly there is a distinction between procedural goals as either a common search for truth or as a conflict between adversaries with opposing interests. Thus if one asks about functional equivalence of nationally different proceedings it should always be determined both in relation to the facts of the matter in dispute and the consequences of the decision.

Labour courts are specialized courts within the judicial system. Their very existence is a sign of internal differentiation of the judicial system. The fact that the legal system is capable to differentiate internally, is an expression of its autonomy. Internal differentiation of the legal system leads to a separation of areas of law and to separate judicial institutions in these areas organized by separate procedures and institutions.

Access to Justice and the Pursuit of Collective Interest

Further differentiation is associated with recent reforms in judicial procedures. Two trends can be observed. Access to justice for the pursuit of collective or group interests on the one hand, and an awareness of the need to

facilitate access for socially weak parties on the other hand.

There now exists a variety of collective legal actions which have been developed and recognized in several procedural laws. Kees Groenendijk neatly characterizes these forms of collective interest representation as "representation of bundled interests" (7). Based on his overview five types of legal collective interest representation can be distinguished.

(a) Test cases (Musterklage): A single litigator acts as forerunner for other cases with only an informal recognition of the relationship with other actual or potential litigators by the court (8).

(b) Amicus curiae: With consent of the court the claiming party is supported by the expertise of a collective party, i.e. an institution or collective interest organization.

(c) Collective action (Popularklage): A single party is allowed to sue in the public interest (9).

(d) Class action: A group of individuals with identical interests is allowed joint action in court as a "class".

(e) Legal action taken by an association (Verbandsklage): An organization or association is allowed to represent a collective interest in court.

These five forms of collective or group legal action locate the parties to the process along the dimension of the increasing scope of organizable interests. Using the parameter of degree of "collectivity" these forms can be grouped in a fourfold table:

7) Groenendijk 1982.

8) See Jost 1981.

9) Trubek 1979.

Table IV-1: Collectivity in Interest Representation

	individual litigant	collective litigant
individual interest	test case, amicus curiae	class action
collective interest	collective action (public interest advocacy)	collective action of an association

From Judgement to Conciliation

A further trend in the development of judicial systems is the increased use of other forms of third party intervention than adjudication. This trend is particularly relevant for labour courts. With the discovery and introduction of alternative legal procedures a gradual shift occurs in emphasis placed on conciliation and the mediation of disputes. Mediation becomes an increasingly preferred alternative, in particular, to the judicial handling of petty conflicts (10).

Differentiation as a move from judgment to conciliation is reflected inside courthouses by variations in the forms of case disposal. Judges are more and more inclined to introduce a repertoire of different forms of disposal. A trend towards conciliation in hearings can be observed. At least in continental European courts, there is a growing understanding that a case should be settled rather than decided by a judge or panel of judges (11).

10) On the experiments in the United States with the settling of small claims and neighbourhood conflicts through special mediation bodies see Tomasic and Feeley 1982. For Germany see Blankenburg et al. 1982 and Röhl 1987b.

11) Gottwald et al. 1983.

Settlement through mediation in court can particularly be discovered in the hearings of German civil and labour courts. Mediation is a preferred method of disposing cases in Germany. Looking at settlement rates of mediation in German civil and labour courts statistically, this trend differs according to type of law and matter in dispute. However, this trend expresses no dramatic change of events in courtrooms in Germany. The figures relating to mediation over recent years make up a practically constant proportion of cases settled (12). This only suggests that mediation and settlement always have been utilized extensively in West German court and are not an entirely new phenomenon.

In the judicial handling of labour and employment conflicts the alternatives to adjudication are the preferred methods of conflict resolution worldwide.

Procedural Informalism

The study of litigation opens up towards these new procedural trends. The previous preoccupation of litigation research with questions relating to concerns of doctrinal civil procedure and with positivistic research on judicial behaviour has been replaced by an interest in experimentation with new forms and structures of legal procedures, and with alternatives to judicial procedures. In the United States the field is known as "alternative dispute resolution" or "ADR" research (13).

Bryant Garth has described the attempts to improve the judicial system as an increase in procedural informalism (14). He defines informal procedural standards as unwritten,

12) Rogowski 1982.

13) See only Murray, Rau and Sherman 1989. See also Goldberg, Green and Sander 1985 and Edwards 1986.

14) Garth 1982.

communicative, flexible, ad hoc, particularistic, and 'vague' rules (15). He associates the trend from formal towards informal types of legal procedure with several developments in Western legal systems:

(1) The judicial system experiments with so-called informal procedures, such as court-annexed arbitration in order to relieve the burden on the official courts.

(2) Mediation and other alternatives to formal adjudication are increasingly preferred by parties to disputes, but also by the state, as a less costly form of dispute resolution which also allows to speed up the procedure.

(3) Increases in compensatory social laws for the underprivileged lead to a reorientation and even a restructuring of the legal profession. Administration of these new laws increasingly uses informal proceedings to improve the effectiveness of the statutes.

However, the movement towards informal procedures has recently decelerated for reasons other than the political anti-reform trend in the Western world. Alternative procedures appear to have a tendency to become formal after a consolidation phase. Thus it might be the case that the alternative forms of third party intervention are only initially characterized by informality and adopt with their organizational growth more formal procedures.

There are a number of critical assessments of informality. It is criticized as vulnerable to abuse by powerful groups and therefore does not serve the interests of oppressed groups who desire a public hearing and moral vindication in order to resist exploitation and domination. From this critical perspective, reenacting formal rules appears to guarantee more social protection than informal

15) Abel 1982, Vol. 2, p. 2.

procedures ("formality as a shield") (16). Other approaches argue more radically. They regard the differentiation of procedures as introducing new forms of state intervention and a colonisation of areas of social life which inappropriately removes conflicts from peoples' life world (17).

Other normative views of informal procedures argue on the contrary that improved access to justice means democratization of judicial institutions. Disadvantaged social groups are invited to seek their guaranteed rights through participation in the judicial system (18). Differentiation of proceedings is seen as a process of 'social' and 'industrial democratization'.

Labour courts are directly affected by these trends. Indeed, they are to some extent frontrunners of informal proceduralism. Most of the recent judicial innovations are already common practice in French, German and British labour courts for some time. They can look back on a tradition of informalism, alternative third party intervention and representation and litigation of collective interests. They have found different organizational forms; the British Industrial Tribunal system, for example, has separated conciliation and adjudication organizationally, whereas the German and the French labour courts combine these two forms of conflict resolution. They are thus able to engage in settlement attempts throughout the whole procedure.

Labour courts have so far not been studied in litigation research as models for a reform of general courts. However, it does not seem unlikely that this might change in future reform discussions of the judiciary. The successful combination of forms of procedure and mechanisms

16) Abel 1982, Vol. 1, p. 297.

17) Christie 1977.

18) Cappelletti and Garth 1978.

of conflict resolution can serve as a model for further internal differentiation of the judiciary.

Labour Courts and the Judicial Hierarchy

French, German and British labour courts have a similar status within the judicial system. They are considered part of the judicial system but not of the ordinary judiciary. Unlike the Italian labour chambers, which are located within the ordinary judiciary (on the level of pretore) and only follow separate procedural law (19), and unlike the American system of private arbitration and semi-judicial procedures within administrative agencies (e.g. National Labor Relations Board), British, German, and French labour courts form an "equal, but separate" part of the judicial system. "Discrimination" against labour courts within the judicial system, for example, in financial or personnel matters, is rather hidden. And the labour courts themselves are seldom unhappy about their independent position. Nevertheless, requests of "officials" of the legal profession to integrate the independent labour courts into the ordinary justice systems are a common and constant event in all three countries under comparison. With an increase in legalism in labour courts, professionalization of judges and tight judicial control through appeal, internal developments even support external threats to the independence of labour court systems. Nowhere, however, do these threats seriously challenge the position of labour courts.

Probably the most obvious distinction in the formal organization of the three types of labour courts is in the composition of the bench. The French labour court adopted a bipartite bench in the middle of the last century,

19) See Treu 1984, and on the legislative history of the beginning 1970s see Cappelletti 1977: 287-331.

consisting of an equal number of elected lay judges, which still operates without a professional judge. In contrast the German labour courts and British industrial tribunals, established in the 1920s and 1960s/1970s of this century, are equipped with a tripartite bench consisting of one professional judge and two lay judges nominated by unions and employer associations.

Labour courts also differ organizationally with respect to specialized sections which cover different industries or parts of the jurisdiction. In France, labour courts comprise five sections: trade, industry, agriculture, executives and other activities (20). In contrast, in Germany and Britain labour courts and industrial tribunals operate under the principle of general jurisdiction; cases are distributed to chambers or panels on purely formal grounds, e.g. the date of reception or the initial letters of the applicants' names. In Germany, only the labour court in West Berlin has specialized chambers (Fachkammern) for different industrial sectors (21).

The following Table IV-2 gives an overview of procedures and appeal instances on the various levels of the judicial dispute resolution process in the three countries.

20) See Pautrat and LeRoux-Cocheril 1984: 46.

21) See the research on the Berlin labour court by Blankenburg et al. 1979: 64 ff. and Diekmann 1984a. Sec. 17 (2) of the German Labour Court Act allows specialised panels if a "need" exists. Ramm 1971: 106 reported a variety of specialised panels in different German States in the 1950s and 1960s.

Table IV-2 Procedural Levels of the Judicial Dispute Resolution Process in Great Britain, Germany and France

Procedural Levels	Great Britain	Germany	France
Conciliation	ACAS	Labour Court: Conciliation Session	Labour Court: Conciliation Session
Adjudication	Industrial Tribunal	Labour Court: Decision Procedure	Labour Court: Judgement Procedure
First Appeal	Employment Appeal	State Labour Court	Cour d'Appel (Chambre Social)
Second Appeal	Court of Appeals/Court Session	Federal Labour Court	Cour de Cassation
Third appeal	House of Lords	(Federal Constitutional Court)	

The formal organization of appeal differs significantly between the three countries. The two levels of appeal in Germany are organizationally independent from the ordinary judiciary, whereas in Britain the second and third appeal lie with the normal judiciary (Court of Appeal or Court of Session and the House of Lords). The first appeal, however, rests in Britain with a labour court, the Employment Appeal Tribunal (EAT), whereas in France the first appeal goes to the Civil Appeal Court of the ordinary judiciary.

In West Germany there are 14 so-called State Labour Courts as first levels of appeal. State Labour Courts, like the normal labour courts, have a tripartite bench with one professional judge and two lay judges. The bench of the German Federal Labour Court, the final level of appeal, consists of three professional judges and two lay judges. The Federal Labour Court is presently divided into seven divisions, known as the "Senat", each dealing with a

distinct substantive areas of labour law (22). There also exists an Upper Division (Großer Senat) which rules on principles in cases of controversy between divisions or in cases of divergence from previous decisions of the Federal Labour Court. The third "appeal" to the German Federal Constitutional Court is put in brackets in the Table IV-2 because it is not considered to be a normal appeal, but rather considered a right of the citizen to be protected against unconstitutional acts of state organs, including courts. However, it is left to the discretion of the Federal Constitutional Court to accept an appeal on constitutional grounds against a court decision, e.g., a decision of the Federal Labour Court; and constitutional appeal does not prevent enforcement of the Labour Court decision. In general, the number of cases accepted to be heard by the Constitutional Court is comparable to the number of labour law cases heard in the House of Lords.

The bench of the British EAT consists of one professional judge who must have been a High Court judge, and two lay members. The EAT has been known until recently to take an activist view on the expansion of the scope of employment protection. Indeed, it has depended to some degree on the "style" of the President of this judicial body to determine in which direction the industrial tribunal system is moving in its still formative period (23). The number of rules established by the EAT and the Court of Appeals has already been criticized as an important factor in increasing legalism in the industrial tribunals (24). Compared to German State Labour Courts and French Civil Appeal Courts, however, the powers of the British appellate

22) See the distribution of jurisdiction according to the internal "caseload distribution plan" (Geschäftsverteilungsplan) of the Federal Labour Court, published for 1985 in *Recht der Arbeit* 1985, pp. 40/1.

23) The EAT policy on wide jurisdiction and the restrictive course of the Court of Appeals are discussed in Dickens 1985: 67/8 and 210-215.

24) Hepple and O'Higgins 1981, para. 775.

bodies are rather restricted. Only appeals on an error of law are allowed in the EAT; it has to accept the findings of fact recorded in the industrial tribunal hearing.

The organizational structure of labour courts and their independence from the other parts of the judicial system are achievements of historical processes. In the following the histories of the labour courts under comparison will be described separately for each court system. Afterwards the organization of the different labour courts will be analyzed in a sociological account of the labour court system.

Political Histories of Labour Courts

Labour courts are shaped by the different traditions of national industrial relations systems. In addition, national legal professions and civil services have played a role in the development of labour courts. The following historical remarks proceed by describing the results of political interaction of industrial and governmental actors in the development of labour law and labour courts for each country. Chronological order is maintained in the presentation insofar as it starts with France, where the first labour courts appeared, and then proceeds with the German and British courts. The development in the United States is included only with respect to rudimentary forms of judicial employment protection in administrative agencies.

France: "Conseil de prud'hommes"

The oldest institutions of employment protection policy can be found in France. As early as the reign of Napoleon Bonaparte the first labour court (conseil de prud'hommes)

was established at the request of the chambre de commerce of Lyon in 1806. Its members at that time were exclusively employers. It took until 1848 to create a bipartite bench with an equal number of employer and employee members (25). The bipartite structure is still characteristic of the French labour courts today. In 1905, appeal to the civil courts was introduced alongside with the possibility of the juge de paix to intervene in cases of deadlock in the bipartite bench (26). In 1907 the jurisdictional basis was significantly enlarged to cover almost all types of workers; agricultural workers, however, had to wait until 1958 to be included.

Until 1979, each French labour court had to be created on special request by a separate government decree and conseils were therefore only created "sporadically whenever a particular need arose in a given area" (27). The conseils had their seats in towns of some size and importance; the local governments had to bear the costs. The jurisdiction of conseils covered only a specified area around the town. This principle of specific territoriality meant that in 1973, for example, only 38 percent of the French population lived within areas covered by conseils (28). In the course of the major reform in 1979 (29), the principle of general territoriality was adopted, which is now supposed to guarantee that all French workers, regardless of their place of work, have access to a conseil; and the financial burden was removed from the local authorities. By 1973, unfair dismissal legislation was introduced which enlarged the courts' jurisdiction. The reform of 1979 abolished the double jurisdiction of the labour court and the civil court to which formerly workers who were not covered by conseils

25) See on the early history of the French labour court David 1974.

26) See an evaluation of interventions in decision-making of the conseils in Jaubert and Sant 1985.

27) Blanc-Jouvain 1971: 16.

28) Rapport syndical 1974, S. 61.

29) Law of 18 January 1979.

could present their claims; civil courts also had exclusive jurisdiction in certain labour law matters. Since 1979 all individual employment matters rest with the conseils. But collective disputes which involve trade unions are in general still excluded from the jurisdiction of French labour courts.

Since the major court reform in 1979 conseils de prud'hommes are divided into five sections within which four lay judges from each side serve on a panel. Conseillers are presently elected for five years with the possibility of renewal (30). All employees and employers in the labour court district, whose geographical limits are spelled out by the decree creating the labour court, have the right to participate in the election. In 1982, the Socialist government created an advisory body, the Conseil supérieur de la prud'homie, which is located at national level and which has a tripartite structure composed of nine members each from unions and employer associations and five members designated by government; it is mainly supposed to discuss organizational matters of the French labour courts (31).

At several times the French unions have made proposals to extend jurisdiction to collective issues. The unions felt strong enough after the victory of the Socialist party in 1981 to ask for direct appointments of their lay judges, but so far jurisdiction on collective interests as well as direct appointments have not been granted.

Conseils have been called institutions of class collaboration which have a function in "banalisation des pratiques conflictuelles" (32). The allegation is that smaller and medium sized employers still ideologically dominate the court and the bench, and that conflicts of the

30) See the Law of 6 May 1982.

31) See Badinter and Delebarre 1985 and Pautrat and LeRoux-Cocheril 1984: 390.

32) Cam 1981: 209.

industrial sector cannot be adequately solved in a court which is dominated by values of the commercial sector. The old French employer ideal of a personally responsible "patron" does not answer the needs of functional management or company management by co-determination (33). It has to be seen if the new form of elections which makes it easier for employees and employers to participate in voting will change the personnel and ideology in the future. However, until now the local character of the courts and "judgment by "peers" (34) still characterizes the French labour courts.

Germany: "Arbeitsgericht"

French labour courts had some impact on the establishment of German institutions of labour conflict resolution in the 19th century, notably in the French-dominated provinces left of the Rhine. However, a general system of labour courts developed only at the end of the century when Bismarck's repressive policy against the Socialdemocratic Party was accompanied by the establishment of basic welfare measures. Before World War I, there had existed trade courts like the "Industrial Courts" (Gewerbegerichte, established 1890) and the "Commercial Courts" (Kaufmannsgerichte, established 1904) which had limited jurisdiction and did not cover agricultural workers. These trade courts had elected lay members from both the employers' side and the employees' side like the French labour courts, but in addition, one professional judge (35).

Labour courts (Arbeitsgerichte) were introduced in 1926 after intensive political debates (36). The Labour Court Act 1926 was part of social reform legislation of the Weimar

33) Cam 1981, chapitre 11.

34) See McPherson and Meyers 1966.

35) See Ramm 1971: 84-5 and Bender 1990.

36) See Michel 1982.

Republic which aimed at democratic structures in companies and basic welfare protection for employees. The Weimar constitution of 1919 contained a programmatic statement: "Das Reich schafft ein einheitliches Arbeitsrecht" (37). This policy statement led not only to the introduction of the Works Council Act in 1919 and the expansion of the social insurance system during the 1920s, but also to several proposals to create new labour courts. In particular the official proposal of 1923 to introduce labour courts as part of the civil justice system was opposed by the trade unions arguing for separate labour courts. They distrusted conservative judges in ordinary courts who similarly disapproved of the new courts (38). The lay members however, from then on, were not elected but nominated from lists provided by unions and employer federations. The bench consisted of two lay members and one professional judge. The labour court was thus characterized by tripartism.

Labour courts were empowered to deal with all problems which could arise out of the employment relationship; access was guaranteed to all types of workers except civil servants. And labour courts had jurisdiction in collective labour law issues, e.g., participation rights of works councils on the shop floor level. Unions and works councils could enforce their statutory rights through these new labour courts. Conflicts of interest (Regelungsstreitigkeiten) were deliberately kept outside labour courts. These conflicts which occur during the period of establishing new collective bargaining agreements remained subject to arbitration. First appeal was to the Landesarbeitsgericht and second appeal to the

37) Art. 157 II Weimarer Reichsverfassung. See also Bohle 1990.

38) On the early history of the labour courts in the Weimar Republic see Wunderlich 1946, Kahn-Freund 1981, Bohle 1990.

Reichsarbeitsgericht. However, both appeal courts were part of the civil justice system (39).

In the Third Reich, major changes in industrial relations were immediately carried out. A "German Labour Front" (Deutsche Arbeitsfront) replaced both trade unions and employer associations. Industrial relations on the company level were conceived of as hierarchically ordered with the employer as "leader" and his employees as "followers". Collective labour law of the Weimar Republic which was designed to support industrial democracy and participatory work relations were immediately abolished; the labour courts' jurisdiction over collective labour law was accordingly removed. However, labour courts kept their jurisdiction in individual matters; the special protection of certain groups of workers, like apprentices and pregnant women, was even enlarged. To a certain degree labour courts had to compete with newly established "Courts of Social Honour" (soziale Ehrengerichte) which mainly controlled employer conduct (40). Labour court judges were closely controlled throughout the Third Reich. From the beginning in 1933, judges who were politically active in leftist parties, like Otto Kahn-Freund (41), or had a Jewish heritage, were expelled from the labour courts. But the labour court system itself stayed in operation until the end of the war.

Labour courts were among the first institutions after the war to regain their pre-fascist jurisdiction through an order of the Allied Control Council (42). The labour courts steadily enlarged their jurisdiction during the 1950s; in particular the Federal Labour Court increased its legal competences by its own decision-making, leading to the

39) On appeal in the Weimar labour courts see Weis 1988: 12-16.

40) See Spohn 1982: 204-5; and generally Wunderlich 1946.

41) See Ramm 1980: XXVI-XXVII.

42) The Allied Command Order No. 21 of 30 March 1946 which reinstated the Labour Court Act of 1926 is documented in Blanke et al. 1975, Vol. II: 162.

allegation that German labour law -- especially in collective matters where only few and scattered statutes exist -- was turning to case law rather than resting on "sound" statutory law (43). A new Labour Court Act (Arbeitsgerichtsgesetz) was introduced in 1953, including articles on speediness, informality (i.e. barring lawyers), and reduced fees (44). Labour courts gained further jurisdiction over collective issues by amendments to the Works Council Act (Betriebsverfassungsgesetz 1972) and the enactment of the Co-Determination Act (Mitbestimmungsgesetz 1976). Since the Dismissal Protection Act (Kündigungsschutzgesetz 1951), which continued the tradition of a 1926 act protecting white-collar workers, only piecemeal reforms in the individual labour law area have occurred. The Labour Law Consolidation Act (Arbeitsrechtsbereinigungsgesetz 1969), amongst other statutes, led to the clearing up and slight extension of coverage and of notice periods in German employment protection law.

Recent discussions about a possible reduction of the scope of employment protection and minimum wages, initiated by employer associations and conservative politicians, thus far have not led to significant legislative changes or increases in the caseload of labour courts. However, there has been a further relaxation for small companies with respect to the application of dismissal protection law. Legislation to promote part-time work, job sharing and

43) Däubler 1985: 33 calls the far-reaching influence of decision-making of the Federal Labour Court on the development of West German collective labour law. "Richterherrschaft" (judicial domination) which, he contends, reveals an aristocratic element in the function of the judiciary which does not fit a supposedly democratic society. Weiss and Däubler 1985: 6 stated in a recent overview of development in German labour law "that the role of the courts in the evolution of labour law in Germany has become much more important than that of the legislator".

44) See sec. 9 to 12 of the Labour Court Act.

The political reforms after Donovan were far less cautious than the Report suggested. Massive state interventions were first proposed by the Labour Government's White Paper "In Place of Strife" (49) and then -- with a different impetus against the unions -- carried out by the Conservative Government in its Industrial Relations Act 1971. This act introduced unfair dismissal legislation along with a tripartite "National Industrial Relations Court" with jurisdiction over collective issues. Repressive actions of this court against strikers clearly increased the already existing hostility of the British labour movement against courts, and it contributed to the final defeat of the Industrial Relations Act in 1974 (50). The unions refused to participate in implementing the act and, subsequently, asked their lay judges to withdraw from the tribunals. The experience with the Industrial Relations Act clearly revealed the social limits of law as a regulatory instrument in industrial relations (51).

After 1974, the era of so-called "social contract" policies of the Labour Government expanded statutory employment protection. The legalization of industrial relations continued despite an "abstentionist" attitude within the Labour Party (52). The "Trade Union and Labour Relations Act" 1974, which repealed the Industrial Relations Act 1971, retained the provisions on unfair dismissal protection almost unchanged. The Employment Protection Act 1975 introduced obligatory conciliation, mediation and

49) In Place of Strife 1969, Cmd. 3888.

50) See, e.g., Crouch 1982b: 75-79; Farmer 1974: 74-82. On the attitudes of the general courts towards industrial relations, see Wedderburn 1978 and Griffith 1981, ch.3.

51) See the title of Weekes et al. 1975. However, the authors also acknowledge the commonly shared view on legislative intervention in the employment protection field: "The least controversial part of the IR Act concerned unfair dismissal." (p.7).

52) See Lewis 1976: 15. A "trend towards the juridification of individual disputes" was acknowledged to continue in the beginning of the 1980ies. See Hepple 1983: 392.

arbitration procedures for collective as well as individual labour conflicts, carried out by a separate government agency, the Advisory, Conciliation and Arbitration Service (ACAS). The Equal Pay Act 1970, the Sex Discrimination Act 1975 and the Race Relation Act 1976 introduced equal employment opportunity ideas into British labour law. The Employment Protection (Consolidation) Act (EPCA) 1978, which now combines all unfair dismissal provisions, stabilised the legal foundation of the development of the industrial tribunal system. The various Conservative Employment Acts throughout the 1980s and the Trade Union Act 1984 seem not to have seriously challenged this development (53); few restrictions were put on the industrial tribunals, although the main emphasis of conservative reforms lies again with symbolic politics in collective labour relations and less with employment protection.

A convincing hypothesis on the origins of the industrial tribunals and ACAS has been proposed by Jon Clark and Lord Wedderburn which casts light on the relationship of the industrial actors to the new tribunals. In their view, official employment conflict resolution forms part of the welfare state and it is the welfare state itself, or rather the people employed by the welfare state, which show an interest in expanding its scope (54).

However, it has also been shown that unions in Britain adopt a differentiated view with respect to protective labour legislation. The unions mainly resist restrictive or repressive legislation. Unfair dismissal legislation and its administration by ACAS and the tribunals is somewhere between protection and restriction as the unions see it. Their attitude has therefore been labeled as "acquiescence rather than acceptance" (55). This is different from employer attitudes, which were always rather hostile towards

53) For the period prior to 1985 see Dickens et al. 1984.

54) Clark and Wedderburn 1983: 178.

55) Dickens et al. 1985: 254.

protective interventionism and led to significant pressure on the Conservative Government to change employment law provisions in the beginning of the 1980s.

Because neither unions nor employers have a particularly strong feeling for the present system of employment protection and industrial tribunals, there is a possibility of further restrictions of the institutional system of employment protection in the future. So far, after the events of the Miners' strike (from March 1984 to February 1985) when ordinary courts were invoked by employers and opposing factions of the miners (56) the Conservative government in its Employment Act 1988 introduced only further legal restrictions on closed shops and strengthened the position of union members by allowing them to sue their union leaders. We might be at the brink of a third wave in British industrial relations which were for long characterized by abstentionism, then adopted protective interventionist and proceduralist attitudes and now might turn towards a reemphasis of rights due to European social law (57). A new wave of social rights will probably strengthen the position of ACAS and the industrial tribunals.

United States: Quasi-judicial Labour Agencies at Federal and State Level

In contrast to the systems discussed so far, there exists no unitary judicial system of labour conflict resolution in the United States. Statutory measures for employment protection are still rare. The National Labor Relations Board (NLRB) which was established in 1935 by the

56) See the legal analyses of the miners' strike in the *Industrial Law Journal* 1985 (3).

57) See, for example, Hepple 1989.

National Labor Relations Act (NLRA) as part of the New Deal welfare measures is still the only quasi-judicial labour law body. It provides special protection for union members and is the major agency of employment protection. In addition, federal and state agencies administer anti-discrimination law (Equal Employment Opportunity Commission, EEOC) and safety and health standards (Occupational Safety and Health Administration, OSHA). There are also federal and state services which provide assistance in solving labour conflicts through conciliators, mediators, and arbitrators.

After the demise of the Labor Disputes Bill President Roosevelt favoured a decentralized approach of a regulatory agency established by statute. The NLRB differed from its predecessor NLB significantly with respect to its collective bargaining function (see on the history of U.S. collective bargaining the relevant section in Chapter II). It went beyond simply being a facilitative authority to become an agency committed "to professional lawyerly standards and procedural precision, and also, of course, with its own powers of enforcement" (58).

However, it fell short of being an industrial court which Andrew and Commons proposed to be introduced in the U.S.. These authors were inspired by the conseils de prud'hommes and by German industrial and commercial courts but argued for a labour court model "modified and adapted to American conditions". They envisaged state and local advisory boards of employers and employees, which assisted state authorities in executing the California Wage Payment Law and the New York Industrial Commission Law, to transform into labour courts "through practice in cooperation between employees and employers" (59).

The NLRB was created to support industrial relations through facilitating the development of collective

58) Tomlins 1985: 133.

59) Commons and Andrews 1916: 86-90.

bargaining between employers and trade unions. However, the traditional trade union AFL, unlike its left-wing rival CIO (60), remained cautious and skeptical towards this form of state intervention. Partly for anti-communist reasons and partly for traditional views of voluntarist collective bargaining the AFL promoted collective bargaining as a private affair outside the domain of the state.

Thus the policies of the NLRB were opposed in an alliance formed by conservative politicians and conservative union leaders. The split between the craft-oriented AFL and the more radical CIO had its effect on the internal operation of the NLRB. An anti-communist witch hunt was carried out in the late 1930s and the beginning 1940s by a Special Committee of the House of Representatives, chaired by Howard Smith (Smith Committee) set up to investigate communist attitudes and activities at the NLRB. Its hearings and reports led to the destruction of the original NLRB. The Smith Committee preceded the House Committees of Un-American Activities of the late 1940s and beginning 1950s. This most hostile anti-communist committee was, as Gross comments, supported by irresponsible conservative AFL union leaders who acted in secrecy and deception of their members (61). In fact these union leaders can be held responsible for the Taft-Hartley Act of 1947, which organized labour later found abhorrent, and for the delegitimation and destruction of state labour policies.

These events surrounding the NLRB, and the experience with state sponsored arbitration during the existence of the War Labor Board in WW II, were responsible for the a conscious policy decision was taken in the late Forties and early Fifties to expand and foster the system of private grievance arbitration instead of establishing an official

60) See Bernstein 1950 and Lichtenstein 1982.

61) Gross 1981.

system of labour courts (62). Arbitrators who had served on the War Labor Board became a stock of experts from which private arbitration could develop (63). A widely debated suggestion to transform the present system of arbitration into a special form of judiciary was made by Hays (64), but was not followed up. It was rejected by the vast majority of labour lawyers and arbitrators.

Since 1972 the government agency Equal Employment Opportunity Commission can be mobilized in cases of discrimination in employment because of race, sex or age. But beyond these administrative agencies there exists no system of labour courts.

Judicial review of arbitration awards has been excluded except in cases of actions of the arbitrator which are not covered by the arbitration clause of the agreement; the final and binding character of arbitration awards was acknowledged by the Supreme Court in three decisions in 1960 (65). Moreover, the NLRB accepts the supremacy of decisions reached through private arbitration: whenever a case can be handled in private grievance procedures, the NLRB restrains itself from further action; it defers the case to the

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- 62) For further references on the rather academic discussions of introducing labour courts in the United States see Rogowski 1981: 120-122.
- 63) See only Fleming 1968: 1-30 on the history of the U.S. arbitration system and Getman 1979 on the War Labor Board.
- 64) Hays 1966. See also the critique in defense of the arbitration system by Wallen 1967.
- 65) See the so-called "Steelworkers' Trilogy": 363 U.S. 564, 574, and 593 (1960). The primary exception from the rule that arbitrators' awards should not be subjected to judicial review is a violation of an explicit, well-defined public policy. This is the case in race discrimination matters. See *Alexander vs. Gardner-Denver*, 415 U.S. 36 (1973) and *United Paperworkers Union vs. Misco*, 484 U.S. 29 (1987). Public policy exemption have been widely discussed. See only Hamilton and Veglahn 1991: 366-370.

dispute resolution institutions established by collective bargaining agreement (66).

The NLRB performs only two functions related to union activities. It controls elections of union representatives ("representation cases") and it prevents "unfair labor practices" which include cases of "discharge" of an employee by the employer because of union activities and cases of misrepresentation of union members by their union officials. The U.S. Supreme Court has enlarged the interpretation of the NLRA beyond formal union activities to a protection of any effort among employees acting in concert to achieve better working conditions (67). In "unfair labor" dispute cases there is an independent investigation of the facts through an NLRB investigator, which may eventually be followed by prosecution and a hearing before an Administrative Law Judge within the NLRB. If necessary, a final decision is taken by the Board in Washington. Appeal lies then with the Court of Appeal and possibly the Supreme Court.

The two major American labour law statutes which amended the NLRA were designed to oppose unions rather than create a "floor of rights" for employees. The "Taft-Hartley Act" of 1947 aimed on the one hand at national strikes and introduced national "emergency procedures" which allow the President of the United States to intervene by imposing "cooling off" periods through an 80-day federal injunction (68). On the other hand, NLRB jurisdiction was enlarged by this act insofar as the adjudicatory review of union conduct in terms of "unfair labor practices" was made possible. The "Landrum-Griffin Act" of 1959, the second major amendment to

66) Spielburg 112 NLRB 1080 (1955).

67) NLRB vs. City Disposal Systems, Inc. 465 U.S. 822 (1984).

68) Sec. 206-10 of the LMRA. During the last twenty days before the injunction expires the NLRB must conduct a secret vote among the employees. See Gorman 1976: 368 and St. Antoine 1984: 263.

the NLRA, aimed at democratic structures within unions by granting union members a "bill of rights" against union officials which can be enforced through the NLRB.

Beyond the protection provided by the NLRB the offspring of general Civil Rights legislation -- the Equal Employment Opportunity Act of 1972 -- provides some employment protection through regulation of discrimination disputes. Litigation under Title VII of the Civil Rights Act of 1964, which prohibits discriminations in all terms, privileges and conditions of employment, must be started through filing a charge with the EEOC. However, this body can only stop the discriminatory practice through conciliation or through persuasion of the employer through holding of conferences. The individual, however, has to start civil action, and the EEOC can only support this claim but has no judicial function itself. There are a number of further employment protection legislations at the federal level which include the Federal Labor Standards Act. However, the United States is still one of the few countries in the world which did not adopt the ILO-Recommendation 119 (1963), which suggests a statute on employer termination (69). Government intervention is mainly designed to support private arbitration, i.e. through its Federal Mediation and Conciliation Service which provides lists (or panels) with names of arbitrators from which the parties can choose their umpire. The same service is also provided by the private American Arbitration Association (see Chapter III).

Labour Court Systems

The following sociological analysis of labour courts starts with conditions of access for the parties. Three sets

69) See Summers 1976 who proposes a separate statute in the

of factors might be distinguished (70): (1) the structure of the mobilization process, (2) party and case variables and (3) access factors related to the judicial organization. The comparison will proceed with several aspects of the judicial organization of labour courts related to procedures, legalism in hearings and implementation of court decisions. Empirically, these comparisons will rely on official judicial statistics as well as data of recent national socio-legal research projects on labour courts and on my own court observations and interviews.

Access Factors: Mobilization Institutions, Parties and Cases

Access to labour courts is influenced by both the organization of the judiciaries and the conditions of the parties (71). The analysis starts with aspects of the party sphere: available mobilization institutions and party and case variables.

Since labour conflicts occur in a collective and organized context, institutions of mobilization play an important role in the invoking of labour courts, especially for employee-applicants. Important mobilization institutions within industrial relations systems are works councils, trade unions and labour lawyers. In this context it is possible to reconsider the dispute resolution systems, analyzed in Chapter III, with respect to their mobilization capacity.

It has been discussed that elected bodies of employee representation within companies, like works councils, are

70) See the overview on access-to-law studies in Rogowski (1986). See also Blankenburg 1987a on caseload developments.

71) See Blankenburg, Reifner; Gorges, Tiemann 1982.

structurally characterized by conflicting functions of representation of an electorate and assistance of individual employees. Works councils, as elected bodies, perform primarily representative functions in company decision-making procedures. Their relative inactivity in dismissal cases qualifies them as institutions with a rather low influence on mobilization of cases to courts. In this context it seems interesting to note that Polish works councils are said to have lost their participation rights in dismissal decisions in 1974 precisely because of a "conflict of representing the workers and protecting their rights. The representative function was seen as having priority ... " (72).

In France and especially in Germany it appears that works councils potentially could be active but actually underexploit their capacities to act in personnel matters. Rarely do these bodies formally contest a dismissal; the strength of the works councils lies in continuous relations with management and informal problem solving but only exceptionally in confrontation. Their mobilization capacity in any event lies inside the company; with respect to outside adjudication there is little support for dismissed workers coming from elected representative bodies inside the company (73). However, works councils also do not oppose or resent the labour courts. Works councils view labour courts largely as complementary institutions to internal decision-making in personnel matters on the company level. For these bodies labour courts are seen as taking part in a decision-making process which is characterized by division of labour rather than rivalry. Works councils in general seem to endorse the idea of outside judicial control of employer decisions because labour courts handle cases which are often

72) Hepple 1980: 488.

73) See for the German situation Höland 1984: 86-169; and generally on the functions of French works councils Carby- Hall 1977: 208-218.

not related to concerns of the majority of the company employees.

This is different with respect to trade unions which act independently of company decision-making and can act freely on behalf of the employee. One reason for being a union member, which is becoming increasingly important also for the organization strategies of unions, is the offer of free legal advice in cases of conflict with the company; within the range of available union services, legal services play a prominent role (74). In all labour courts under comparison there is the possibility of legal representation by officials of unions or employer associations during the hearing. This enhances the capacity of association officials to act as mobilization agents in individual cases. Legal representation by collective interest group representatives, in fact, most clearly distinguishes labour courts from ordinary civil or criminal courts.

However, research has shown that in British industrial tribunals only about half of the union members in court actually use their union services for contesting a dismissal in court (75). The other half of union members employ their own lawyers or act alone. But union members are also generally underrepresented amongst the applicants compared to general figures of unionization (76). This can be explained by the greater opportunities of union members to resist dismissals in early stages of the conflict, i.e. by appeal to company grievance procedures which are a result of negotiations of unions and management; or it may reflect a capacity of unions to handle cases with management informally. Union members who fail in their case at this stage might no longer rely on the union and rather use a lawyer to contest the employer decision.

74) See Gawron and Rogowski 1982.

75) See Dickens et al. 1985: 46.

76) Dickens et al. 1985: 36 for Britain; and Falke et al. 1981: 639-646 for Germany.

Underrepresentation of union members in labour courts or tribunals is generally an indication of the filter function of union legal advice; information on low success chances, given to the dismissed employee in interviews with the legal department of unions, discourage many applicants from further action (77). In Britain, the preventive function of information on low success chances has been instrumentalised by the industrial tribunals; in so-called "pre-hearing assessments", introduced in 1980, industrial tribunals can provisionally try without a full hearing certain cases in which the tribunal thinks that there is "no reasonable prospect of success" (78). The parties, however, are legally not prevented to continue from seeking a full hearing.

In all three countries an increasing tendency can be observed to use advocates or lawyers, sometimes specialized in labour law, as mobilization agents. Especially in Britain, it has been argued that this is a reason for increases in legalism in the tribunal system. Although labour law cases are in general not attractive to European lawyers when compared to corporate legal business, an expansion of the legal profession in the last years, which brought young and socially-minded lawyers to the bar, has increased the attraction of this field of law. European lawyers who specialize in labour law often seem to like to work for both sides; this is different in the United States, where a rather clear distinction can be made between management law firms and union law firms.

Besides the activity and availability of mobilization institutions, access to justice depends on the circumstances of the case and the abilities of the parties to file a claim. Applicants in labour courts are almost always

77) See on the "opportunities for the union to be selective in which cases to pursue" Dickens et al. 1985: 47/8.

78) Industrial Tribunals (Rules of Procedure) Regulation 1980, S.I. 1980 No. 884, Schedule 1, reg. 6 (2).

employees rather than employers, which illustrates the fact that employment law in general is a protective device for workers and not a neutral law which applies equally to both sides of the employment contract. Even in West Germany, where the employer enjoys statutory rights which can be enforced through the labour courts against an employee or a works council, employer claims have decreased since the 1960s; in 1981, less than four percent of all claims were filed by employers. However, if cross-petitioning or counterclaims are included, employer claims occur in about a third of all cases (79).

Most important with respect to parties is their knowledge of the right to apply to the labour court and the ability to file a claim or respond to it. Personal limitations can create insurmountable barriers to access to courts; for example, the problem which writing a letter poses for employees who are not well educated should not be underestimated. Britain has lowered these barriers by adopting a standardized application with prescribed text and questions (80); an equally easily understandable form is available to respondents (81).

Research on British industrial tribunals reports that applicants mention "friends and relatives, the media, and local job centers and unemployment benefit offices" (82) as their main source of information. This conforms rather well with general research on legal consciousness, the ranking of legal information sources, and first legal contacts in Western as well as Eastern countries (83).

79) Estermann 1984: 73.

80) See "Original Application to an Industrial Tribunal", also called IT-1 form.

81) See "Notice of Appearance by Respondent", also called IT-3 form.

82) Dickens et al. 1985:183.

83) See only Blankenburg 1980a who discusses empirical findings on first legal contacts and mobilisation of courts.

An important characteristic of cases in labour courts is the fact that the underlying employment relationship usually has already been terminated when the claim is filed. It is left to the employee to change the status quo created by the unilateral termination of the employment relation by the employer. It has been argued that it is generally unfavourable to initiate the change of status quo through a court claim; for example, applicants have to state the facts of the case in a way which fits the criteria of a legal claim used by the courts in reviewing the dismissal decision (84). And the right choice of the form of claim can determine the outcome. In Germany for example, the employee is well advised to file a claim for reinstatement even if he or she is not convinced that it will be the best solution to return to the old job; under German law it pays in the end to file such a fictitious claim because of possible settlements in court during litigation; this demands intelligent strategic behaviour on the side of the employee.

Cases also are characterized by the context from which they arise. In West Germany and in Great Britain the number of cases related to conflicts in small firms is proportionately high (85). This fact confirms findings on the distribution of company grievance procedures in Britain or works councils in West Germany (see Chapter II). Both are found less frequently in small and medium-sized firms. Courtroom litigation for the employees of small firms seems, to a certain degree, the functional equivalent of what internal company grievance procedures are to employees of larger firms.

The number of cases which labour courts and tribunals receive each year can reveal interesting developments in access to these judiciaries. The following comparison of

84) See Röhl 1981.

85) See Blankenburg et al. 1979: 69-73 for Germany; and Dickens et al. 1985: 87-90 for Britain.

caseloads is restricted to the period from 1974 to 1984; the data is taken from national judicial statistics.

Table IV-3: Caseload of Labour Courts in France, West Germany and Great Britain (Cases Received)

	Conseil de Prud'hommes	Arbeitsgericht	Industrial Tribunal
1975	79,648	301,625	32,734*
1976	76,680	288,388	43,066*
1977	77,668	296,376	41,995*
1978	83,385	327,271	43,319
1979	98,497	273,978	41,244
1980	114,366	302,602	41,424
1981	129,131	347,520	44,852
1982	143,954	386,789	43,660
1983	152,000**	365,363	39,959
1984	151,000	361,435	39,819
1985	150,902	367,725	n.a.
1986	144,033	365,895	39,404***
1987	142,991	360,813	34,233***
1988	145,522	356,960	29,317***
1989	n.a.	336,816	n.a.
1990	n.a.	325,969	n.a.
		(+ 100,296)	
<p>* (excluding Scotland) ** (estimated) *** (since 1986 financial year: April to March; only outcome of cases) Sources: Annuaire statistique de la justice 1983, Paris 1985, 75.; 1984, Paris 1986, 79; 1986, Paris 1987, 79; 1987, Paris 1989, 69; 1988, Paris 1990, 57. Statistisches Jahrbuch Bundesrepublik Deutschland 1976, 311; 1979, 316; 1982, 330; and Bundesarbeitsblatt 6/1983, 116; 6/1984, 136; 6/1985, 98.; 6/1986, 122; 7/1987, 86; 7/8/1988, 196 and 7/8/1989, 99. COIT Fact Sheets July 1982 and March 1985 (England and Wales) and February 1983 and April 1985 (Scotland). The Employment Gazette, May 1989, 258; April 1990, 214.j</p>			

The French labour courts increased their caseload until the middle of the 1980s. Since 1982 the caseload has remained at a level between 140.000 and 150.000 cases. In 1983, the caseload of conseils had more than doubled compared to 1974. The reform in the beginning of 1979, which enlarged jurisdiction and increased the number of courts to meet the criteria of general territorial coverage, seems to

be a main factor which has caused an increase in caseload of around 15 percent each year until 1983.

German labour courts experienced a total increase of 20 percent between 1974 and 1984; and this increase was not steady. The caseload dropped from a peak of more than 386.000 cases in 1982 to about 326.000 in 1990. However, the situation will change after the incorporation of the five new states. In contrast to both the French and the German courts, the caseload of British industrial tribunals decreased from 1976 to 1988 (except for 1981), apparently as a result of restrictions in eligibility for employment protection.

A comparison of the caseloads reveals that in 1983, German labour courts had more than twice as many cases as French labour courts and almost ten times more than the number of cases received in the British industrial tribunals. It should be mentioned, however, that about ten percent of the German are technical cases concerned with social insurance matters which usually need no hearing. And the British figures would increase by ten percent if the ACAS caseload of received cases would be used in the comparison instead of the figures issued by the Central Office of the Industrial Tribunals (COIT). The ACAS caseload consists now of more than thirty percent cases where no formal complaint was made to an industrial tribunal but ACAS assistance was sought under special sections of the EPCA 1978 (86).

It has been argued that court input and organization is linked to trends in industrial relations and labour markets. Declining union power, however, does not directly affect labour courts because institutionalised participation of unions and employer organizations is only in the long run dependent on the relative strengths of these associations;

86) See ACAS 1988: 56, Figure 5-1..

their participation in labour conflict resolution is protected by the state, and their public status remains despite declining membership. By contrast, rates of unemployment have a direct impact on caseloads. A close correlation between unfair dismissal applications and unemployment rates, for example, has been found in Germany (87).

The French labour courts are formally restricted to hear only individual labour law cases whereas West German labour courts, and to a minor degree also British industrial tribunals, are also involved in collective labour law issues. But this distinction is rather arbitrary and misleading for a proper comparative account. Napier reports that French labour courts have adopted a wide interpretation "by classifying disputes apparently collective as legally individual" (88); the jurisdiction of French labour courts is therefore wider than the jurisdiction of their British counterparts, according to his analysis.

Physical Factors: Location, Architecture, and Furniture

Access to courts is not only a function of statutory rights, mobilizing institutions or party and case characteristics, but also of physical factors related to court buildings. These physical factors can influence the attitudes and behaviour of the parties. There are three principal physical factors which are associated with court buildings: their location, their architecture and their furniture.

87) See Blankenburg et. al 1979: 56 and Table 3 and Diekmann 1984b.

88) Napier 1979: 271.

In 1983, 282 French labour courts, 95 German labour courts and 29 British hearing accommodations of industrial tribunals were officially reported.

Table IV-4: Number of Labour Courts (First Instance) in France, Germany and Great Britain in 1983

	France	Germany	Great Britain
Number of courts**	282	95*	29
Cases per court	539	3757	1373
* only West Germany ** permanent hearing accommodation Sources: Annuaire statistique de la justice 1983, Paris 1985, II- 59; Handbuch der Justiz 1988: 256-267; COIT England/Wales, March 1985, para. 3; COIT Scotland, April 1985, para. 4.			

Combining the number of courts with the caseload figures presented in Table IV-3 shows that each French labour court handled on average 539 cases in 1983; in comparison, each German labour court had to handle 3,757 cases and each British industrial tribunal 1,373 cases. Labour courts, of course, differ in size between big cities and small towns. This is especially true for France. About 25 to 30 percent of the cases were handled by the Paris labour court alone while almost the vast majority of courts handle less than 500 cases per year (89). One might therefore draw the conclusion that German labour courts generally tend to be larger in organization than their British and French counterparts because they handle seven times, respectively three times, as many cases.

89) Moritz 1987: 156/7.

The location of labour courts, tribunals or quasi-judicial agencies in Great Britain, West Germany and the United States is similar in that these judiciaries are often not located in separate buildings but are part of larger buildings where non-judicial business is also carried out -- either other governmental or even private business. Physically, labour courts appear therefore rather as a part of the structure of employment offices than as separate judicial control institutions.

A difference among the countries can be observed with respect to the area of the city where the labour court is located. In Britain, industrial tribunal buildings often are located in the financial and commercial center of the city. An example is Birmingham, where the industrial tribunal is mainly located in the "Phoenix House", built by an insurance company and still used by several private businesses. Most of the people working in this part of the city wear an almost uniform business dress consisting of a dark "three-piece" suit, dark shoes, tie, and sometimes bowler; their appearance marks them as clearly related to the financial or business world. An impact with respect to accessibility is immediately felt by any observer or participant. It can be expected that normally employers will accommodate more easily to this business atmosphere than their employees, although white collar workers who work regularly in this area will in some cases have an advantage over small employers from remote areas of the town.

The German court buildings visited usually were located in rather neutral areas; sometimes the area is dominated by other court buildings, and the parties then encounter similar problems with physical access to the labour court as they may have with visiting ordinary courthouses.

The architecture of labour court buildings is usually not designed to impress the parties; it rarely represents to the outside world an authoritative power of government as

can be the case with criminal courts. Most of the labour court buildings and agencies visited in Germany, Britain and in the United States were rather similar with respect to their architecture: plain office buildings which express a civil-service mentality. The welfare state rather than the repressive state is reflected in the architecture of these buildings.

The interior design matches the visitor's impression of the external architecture. The furniture in the courtrooms is usually plain and modern. The order of the tables and chairs is not dominantly hierarchical. Unlike the ordinary civil or criminal courts, the bench is not raised much above the parties and their representatives. There often are large windows which allow natural light to enter the courtroom. However, the view from these windows usually reminds one visually of the relation of court proceedings to the industrial society in which the cases occur, looking out over roofs or walls of other office buildings or factories.

Personnel Factors: Judges, Representatives, and Clerks

An important factor which characterizes organizations like the labour courts is their personnel. Three groups within the personnel of courts can be distinguished: (1) Judges or chairmen and lay judges, (2) legal representatives and (3) clerks.

The overall numbers of professional and lay judges of labour courts in 1984 are compared in Table IV-5.

Table IV-5: Number of Labour Court Judges in France, Germany and Great Britain in 1984

	France	Germany	Great Britain
Professional Judges or Chairmen	-	492*	227
Lay Judges	14,988	11,190**	2,286
Cases per Professional Judge or Chairman	-	726	175***
<p>* only West Germany; including part-time judges and trainee judges in probationary period; the figure excluding those judges in probation is 415. ** figure for 1979 *** including part-time chairmen; the figure for full-time chairmen only is 265.</p>			
<p>Sources: Handbuch der Justiz 1988: 256-267; Falke et al. 1981: 493 COIT England/Wales, March 1985, para. 3; and Scotland, April 1985, para. 3. Pautrat and leRoux-Cocheril 1984: 4.</p>			

Recruitment patterns and legal socialization of professional judges differ significantly. Chairmen of industrial tribunals in Britain are barristers or solicitors. The law requires that they have "a standing of at least seven years" as an advocate, but often they are at a late stage in their career. They are appointed by the Lord Chancellor, as are judges generally in Great Britain. About a third of the 227 chairmen in 1984 were full-time chairmen; and two-thirds were part-time chairmen.

West German labour court judges pursue a career separate from their colleagues in ordinary civil courts. Until the beginning of the 1960s it was possible for industrial relations specialists, i.e. union or management representatives, to become labour court judges; today only candidates with the usual two law degrees are able to apply for these positions. A German law graduate usually makes an early choice as to whether he will strive for a labour court

judgeship. Nowadays there is severe competition for these judgeships and only the candidates with the best scores in their second law degree will be accepted for a judicial position. A labour court judge will usually stay with this post for the rest of his career; the career expectations are oriented towards appellate labour courts rather than towards the bar.

In 1988 there were 492 professional judges in West Germany (90). It is mainly due to traditional distrust by the unions of the legal profession that the nomination to the German labour court rests with the Minister or Senator of Labour (and not with the Minister of Justice). A nomination for a labour court judgeship has to clear a tripartite committee consisting of an equal number of members from the unions and the employer associations and of presidents of the labour courts (91). Candidates may improve their chances if they have special training in labour law or industrial relations. German labour court judges are said to be "somewhat more leftist" than their average colleagues in the ordinary courts, and their higher rate of membership in public service unions rather than in the Federation of German Judges is a good indication of this. However, when union membership of judges was taken as a variable in order to analyze outcomes, no significant correlation could be found; although union members on the bench had significantly different attitudes towards industrial relations, their actual decision-making showed no significant differences compared with their colleagues (92).

In 1984 there were about twice as many professional judges in labour courts in West Germany as in Britain. The German labour court judges handled on average 726 cases in 1988 (counting all judges, 860 if only fully qualified full

90) See Weiss et al. 1984: 101 for earlier and slightly different figures on the number of judges.

91) Sec. 18 (1) of the West German Labour Court Act 1953.

92) Rottleuthner 1984b: 296.

and part-time judges are considered) compared to only 175 cases in Britain (in 1984). It should be noted that only a third of the British chairmen are full-time chairmen. If only these chairmen are taken for the calculation of the workload of professional members of the bench, and if one counts two part-timers for one full-time member, one arrives at about 265 cases per full-time chairman in 1984, which is still only approximately a third of the number of cases handled by their German colleagues (the proportion of part-time judges is much lower in Germany, 24 in 1988). German labour court judges are appointed for life tenure; their British colleagues are appointed for five years, but they are eligible for reappointment.

In France judges are not appointed by the Minister of Labour or Justice but are elected in local constituencies of the labour courts. Elections now take place every five years. The French trade unions and employer associations have a high influence on the lists from which the lay judges are elected. Conseillers are directly elected into one of the five industrial sections of the court by the employees and employers of these industries. These elections do not guarantee that local specialists will serve in the labour courts. Conseillers are not elected as special experts but as representatives of the unions or the employers' associations (93). In a recent sociological study of the new conseillers after the 1979 election, they were still characterized as "notables" who had attained professional stability and continuity in their occupations. And according to this study conseillers cannot be called young activists: more than three quarters of the employer conseillers and about two thirds of the employee conseillers are more than 38 years old (94). Cam reports that in the 1970s small entrepreneurs dominated the employer side of the bench (95).

93) Moritz 1987: 158.

94) Bonaf+Schmitt 1985: 35-8.

95) Cam 1981: 47.

Recruitment of the two lay members of the bench in West Germany and Great Britain is rather similar. Lay judges are nominated by trade unions and employer associations, and in both countries the labour or employment ministries appoint them from lists provided by the associations without much intervention; the nominating associations cannot, however, exert influence on the lay judges after they have been selected (96). In Germany, associations are allowed to nominate any person for a lay judge position who is over 25 years old and has not committed a serious crime (97); lawyers are permitted as lay judges. In Britain, more than a third of the union-nominated lay members are union officials, and almost all union-nominees hold active positions within unions. British employer-nominated lay members are dominated by executives who are personnel and industrial relations officers at the time of appointment.

German lay judges are nominated for four years, whereas they serve for three years in Britain. In both countries there is the possibility of renewal. There were about 1800 lay members in 1989 covering England, Wales and Scotland. In a "Special Feature" on industrial tribunals in the official Employment Gazette the following information on British lay members was given:

"They are paid a fee of £ 82 a day, plus travel and subsistence, and are asked to be available to sit at tribunal hearings on about fifteen days a year. ... Of the 1800 present members, about 22 per cent are women and 1.7 per cent are from the ethnic minorities. ... New members are not normally appointed over the age of 60, but once appointed they may carry on until reaching 69. New members are also expected to be in current employment or to have retired recently. There is no lower age limit, but it is not considered that many people under the age of 40 will

96) A difference, however, can be observed with respect to the type of employer lay judge: it would be rather unusual to find former colonial officers serving as employer lay judges in the West German labour courts, but not so in British industrial tribunals.

97) Sec. 21 of the Labour Court Act 1953.

have had sufficient work-based industrial relations experience." (98)

More than two-thirds of the British lay members are over 56 years of age; it seems to be a job at the end of a career within the "business" of industrial relations (99).

About half of the lay judges in Germany are attached to panels for a certain period; the other half will be seated on panels which are newly constituted for each case (100). In Britain, the regional chairman of the industrial tribunal will select lay members for a particular hearing (101). A German study reported that lay judges in general and labour court lay judges in particular see their roles as being neutral decision-makers rather than as advocates of a particular side in an industrial controversy (102). Similarly, British lay members revealed an almost unanimous acceptance of the non-representative, impartial nature of their role in industrial tribunals (103).

A second group of professionals in court are the legal representatives. As Table IV-6 shows, trade union officials represent every fifth worker in British industrial tribunals and every fourth worker in German labour courts in unfair dismissal cases. Representatives of employer associations are more likely to appear before the West German labour courts than before British industrial tribunals (excluding ACAS). Comparable data for the French labour courts was not available.

West German labour court procedures may appear more as an interaction among lawyers since only seven percent of employers and twenty five percent of the plaintiff-employees

98) Employment Gazette, May 1989, p. 256.

99) On the social status of British lay members see also Dickens et al. 1985: 57-58.

100) Falke et al. 1981: 874.

101) See Hepple and O'Higgins 1981: 365.

102) See Klaus 1972.

103) Dickens et al. 1984: 63.

are not represented, while in the British industrial tribunals more than one third of both plaintiff-employees and employers still appear without any representation. On the other hand, company executives on the employers' side can be found in about one out of five cases in both systems.

A final remark concerns clerks who are present in hearings of the labour courts. In German courts, the clerk is a (usually female) secretary who has the duty to call witnesses waiting outside the hearing room, to arrange oath-taking, and to organize the seating. But the most important duty is the typing of judgment by default and particulars of settlement arrangements which are handed to the parties when the hearing has finished. In these cases it is not necessary for the parties to make further applications after the hearing. A written decision, however, which contains reasons for the decision will be produced after the hearing. In Britain, the (usually male) clerk at the hearing performs similar functions to his German counterpart except for witness calling; this is not necessary because witnesses are allowed to attend the hearing during the whole procedure. British clerks often appear rather distant and conservative; their reference group is inside the tribunals about which they can tell many a story.

Table IV-6: Representation of Parties at Hearings in Unfair Dismissal Cases in Great Britain and Germany

	British Industrial Tribunals		German Labour Courts (Conciliation Session)	
	Plaintiffs	Respondents	Plaintiffs	Respondents
Self-representation	45%	33%	25%	7%
Trade Union or Employers' Association Representatives	22%	5%	29%	29%
Represented by Attorneys	23%	41%	42%	38%
Others (Associates, Friends, Managers Executives)	9%	21%	4%	26%
	100%	100%	100%	100%
	(n=596)	(n=443)	(n=1075)	(n=1036)
Sources: Dickens et al. 1985: 45, table 2.7. Falke et al. 1981, Vol.II: 627, Tab. IV/57 and 647, Tab. IV/66.				

Secretaries of the French conseils play an important role because they are considered an element of professionalism in an otherwise lay court. The secretary has the knowledge of the relevant law, and it is often left to him to draft the written judgment. It has been observed that "conseillers will decide the outcome and then leave it to their secretaries to produce reasons which reconcile the decision with the appropriate legal rules" (104). Because of the important role of the secretaries, it was suggested in the 1960s to view the French labour courts as a judiciary with in fact a tripartite rather than a bipartite bench

104) Napier 1979: 275.

(105). However, after the major reform of the French labour courts in 1979 the secretaries decided to withdraw from participating in decision-making of the labour court. They followed a suggestion of their respective interest organization in order to achieve an equal status to the secretaries in the ordinary courts. The withdrawal of the secretaries is seen as a major setback for professionalism in the French labour courts (106).

Procedural Factors: Types of Procedure and Modes of Termination

Procedural arrangements differ formally between the countries. German procedural law distinguishes between procedures for individual matters (Urteilsverfahren) and procedures for collective matters (Beschlußverfahren). The first form of procedure deals mainly with particular problems arising in relation to the contract of employment, and in addition with company pension problems, with disputes among employees, and also with disputes between collective bargaining parties. The second type of procedure is used mainly in works council matters, but also matters concerning elections of employee representatives to the company boards and recognition of unions as bargaining agents (107). In the latter type of procedure the labour court technically does not decide the conflict but issues a "statement" on the case; accordingly, participants are not called parties but "persons involved" (Beteiligte) (108). However, the legal distinctions blur when events, expectations and activities of the parties "involved" in the

105) McPherson and Meyers 1966: 40.

106) See Pautrat and LeRoux-Cocheril 1984: 100; Moritz 1987: 161.

107) See sec. 2 and 2a and 46 to 98 of the Labour Court Act 1953.

108) See Zöllner 1983: 502.

two types of procedures are compared. The procedural distinction does not exist in French and British procedure, primarily because of the exclusion of collective labour law matters from their jurisdiction, although the British tribunals do handle a number of trade union conflicts (109).

Another important distinction with respect to procedures for handling individual labour conflicts applies both to French and German labour courts. All individual cases will first be tried in a conciliation session, and only after an unsuccessful conciliation attempt will the case proceed to a full hearing. In conciliation sessions only agreements between the parties can settle the case, and the court is empowered to decide the case. In France, conciliation usually is performed by two judges, one from the employer and one from the union side; in Germany, the conciliation session takes place before the professional judge without the lay members. In comparison, the full hearing will be conducted by at least four conseillers in France. The tripartite bench in Germany presides during the full hearing.

Interim relief procedures exist in all three countries. Whereas in Germany (einstweilige Verfügung) and in France (référé) urgent claims can get interim relief orders, in Britain the interim relief procedures can only be used if the dismissal was alleged on grounds of trade union membership or, since 1982, for non-membership of a trade union.

In Britain, the functional equivalent to compulsory conciliation procedures of labour courts is individual conciliation performed by officers of the independent agency ACAS which has already been discussed in Chapter III. The overall rates of appeal differ significantly between the

109) Out of 32 jurisdictional matters of industrial tribunals, listed by Hepple and O'Higgins 1981: 362-4, at least six are related to trade union activities.

countries. In German unfair dismissal cases, an appeal rate of 38 percent of the labour court decisions has been reported (110); it should be noted, however, that only 14 percent of the cases get a decision (see Table IV-7). In British industrial tribunals, only 5 percent of the cases are appealed (111), whereas in France an extraordinarily high figure of 55 percent of the appealable decisions is mentioned in the research to go to appeal (112).

In looking at the mode of terminations of labour court cases one finds remarkable ratios of conciliated settlements and judgments between the three countries.

As can be seen from Table IV-7, the rate of conciliation in French labour courts has been about six times lower than in German labour courts (113) and three times lower than in the British industrial tribunal system. The rate of adjudicated decisions is accordingly more than five times higher in French labour courts than in German labour courts and more than two times higher than in British industrial tribunals. France also shows only half of the rate of withdrawals and summary judgments than British tribunals and German labour courts.

110) See Falke et al. 1981, Vol. II, 974.

111) Employment Gazette 1982: 520 and (British) Judicial Statistics 1981: 87, table G.4.

112) See Moritz 1987: 189-191.

113) The rate of conciliated settlements drops below 40 percent in German labour courts if all terminated cases -- and not only terminated unfair dismissal cases -- are considered; see Rogowski 1982: 174, table 1.

Table IV-7: Mode of Termination in the British Industrial Tribunal System, the German and the French Labour Courts

British Industrial Tribunals and ACAS (1982)*		German Labour Courts (1978)*	French Labour Courts (1980)	
			Concilia- tion	Judg- ment
Settlement through Conciliation	35%	60%	12%	3%
Withdrawal and Summary Judgment	30%	26%	9.5%	17%
Decisions and Hearings	35%	14%	78.5%	80%
	100%	100%	100%	100%
	n=33,109	n=97,164	n=103,884	n=49,172
* only unfair dismissal cases Sources: Annuaire statistique de la justice 1983, Paris 1985, 75. The Employment Gazette, Oct. 1983, 449. Falke et al. 1981, Vol.II, 974.				

In analysing conciliated settlements in France, Britain and Germany, one has to remember the institutional difference as to how settlements are achieved by third party intervention. In West German and French labour courts, conciliation is the mandatory first step of court procedure. Initial conciliation attempts in Great Britain are left to independent ACAS officers. ACAS conciliation is a pure go-between institution which is organizationally independent from the industrial tribunals. ACAS gets a copy of each application made with the industrial tribunals. ACAS individual conciliation performs the same function as conciliation sessions in German and French labour courts.

ACAS conciliation officers are civil servants who often have had a career within the civil service. At the start of ACAS, in the middle of the Seventies, most of the conciliation officers were recruited from the staff of the Department of Employment. ACAS conciliation is particularly important for self-represented parties who have the opportunity to assess the merits of their cases through information about legal requirements and the formal steps in industrial tribunal proceedings. This information is provided through contacts with the conciliation officer initiated by the officer (114). According to an internal rule, if the ACAS conciliation fails to settle the case within six to ten weeks after the claim has been filed, a hearing before an industrial tribunal will be automatically arranged. In these hearings, the industrial tribunals are less prone to achieve settlements than the German labour court in hearings in front of the three judges. The procedure followed in the tribunals is a predominantly adjudication-oriented, adversary proceeding. In contrast, conciliation attempts continue in the full hearing before the German labour court, which can be explained by the fact that German procedural law has put both functions (that of conciliation or mediation and of adjudication) into the hands of the same professional judge, allowing him to use both functions directly or indirectly in both sessions. Although procedural provisions allow a similar behaviour, the French labour courts differ in practice significantly from the German courts; only three percent of the cases are conciliated in the judgment session. And there has been a long debate on the dramatic decline of conciliated settlements even in the conciliation session. Less than ten percent of the cases terminate nowadays at this stage (115).

114) See Dickens et al. 1985: 149-157 on organisation of ACAS and information on the actual conciliation processes.

115) See Supiot 1985 and Pautrat and LeRoux-Cocheril 1984: XXX-XXXII.

Procedural Principles and Degrees of Legalism in Labour Judiciaries

Legalism in labour courts is a topic which has evoked lively discussions in all countries under comparison, but especially in Britain (116). Under the broad heading of legalism several distinct issues have been discussed. On the one hand, the debate is linked to discussions of juridification of industrial relations insofar as the introduction of new legislation also broadens the jurisdictional basis and the possibilities of activist interventionism of labour courts. An empirically feasible concept of juridification, however, has to relate an increase in norms to indications of actual use of these norms, i.e. mobilization of courts. If juridification is made operational in this sense, the caseload development of labour courts becomes an interesting variable in determining the extent of legalism. As already discussed, French and German labour courts showed a significant increase in caseloads in the 1970s and in the early 1980s, with the German labour courts handling almost twice as many cases than French courts. Britain, on the other hand, showed overall a declining caseload. In the beginning of the eighties they had only about one tenth of the caseload of German labour courts (see Table IV-3). In this perspective French and especially German labour courts might be called more legalistic, because more conflicts are solved by the judicial interventionism of these courts.

A similar result is obtained if legalism is related to legal representation. It has already been mentioned that about 40 percent of British and German respondents (employers) are represented by lawyers; but German applicants (employees) use legal representation twice as

116) See for Britain: Munday 1981, and the "Special Feature" on legalism in the DE Gazette by Leslie 1985: 357-362.

often as British applicants (see Table IV-6). And French labour courts would be considered especially legalistic if the rate of appeals is taken as a measure for legalism; every second appealable decision of French labour courts seems to be appealed in Civil Appeal Courts compared to only 5 percent in Britain. However, it has been argued for Britain that the EAT and the Court of Appeals have a legalizing effect because their decisions are treated as precedents by industrial tribunals. Formalistic use of norms and inflexibility in procedure are results of decision-making by higher bodies of the judiciary in Britain (117).

If legalism is measured by the types of interactions in labour court or tribunal hearings, a different result is reached. Industrial tribunals are "informal" only relative to the procedural rules and practices of ordinary British courts. From a sociological perspective the roles of participants in "adversarial" procedures show a high degree of formality when compared with the so-called "inquisitorial" procedures of Continental labour courts. Continental procedure requires both parties to formulate their arguments -- including the evidence that they are prepared to provide -- in the brief of the case; the German labour court judge, who will chair the proceedings, might even ask for additional information in preparation of the hearing. In this way, a file builds up based on an exchange of the arguments and evidence offered by both sides. Yet advocates for both sides may also contact each other by phone, or occasionally, may meet in the halls of the court building to attempt to settle the matter out of court. The court does not learn about such out-of-court negotiations unless the applicant withdraws from the case or one party defaults.

117) See Hepple and O'Higgins 1981: 364 and Dickens et al. 1985: 77.

In German labour courts, the judge adopts an active role in settling cases which, to some degree, varies with the attitudes towards their judicial role. The Labour Court Act requires that the judge attempts to get the parties to settle by mutual consent at the initial hearing. In the Berlin labour court, for example, it could be observed that some of the more settlement-minded judges allowed, on the average, fifteen minutes for the initial conciliatory hearings. Some of the less settlement-minded judges allowed only five minutes. And also the judgment sessions are comparatively short in German labour courts; they usually last less than 30 minutes (118). In contrast, British industrial tribunal hearings last several hours, and it is not uncommon that they carry on for a whole day (119).

The settlement orientation of the German judges, which is generally high, in fact not only dominates the conciliatory session but also the judgment session. To a considerable extent it reduces legalism in the hearing. The judge's attempts to get the parties to reconcile continue through all of the formal proceedings and are sometimes aided by lay members of the bench. Parties are encouraged to settle at this later stage in order to avoid further costs and uncertainties involving witnesses and other types of evidence. Judges use several techniques of persuasion ranging from economic considerations, to hints about legal uncertainties or psychological pressures. In this sense, the judge is the most active actor in the courtroom and may repeatedly formulate possible terms for settlement. He does this based on his legal evaluation of the case as well as on the outcome most likely to occur. Settlement, therefore, is not achieved by the parties' anticipation of the costs of continuing the formal proceeding alone, but also by the

118) According to observations of a German research team, 95 percent of conciliation sessions and 71 percent of judgment sessions last less than 30 minutes; see Rottleuthner 1984a: 32.

119) Dickens et al. 1985: 205, table 7.5.

judge's explicit view of what the settlement options of the parties are in light of what the likely outcome of the case will be if it is pursued. In addition, the German judge has an interest in settling cases by agreement because it saves him writing a judgment. In France, there is less incentive for the bench to reach for settlement because the writing of decisions is widely left to the secretaries of the court, as already mentioned.

In conciliation processes in German labour courts two issues are often subject of debate: the amount of compensation and the type of dismissal, i.e., termination with or without notice. The employer usually has a basic interest in settling the case quickly without a reinstatement order. The employee, on the other hand, if he or she is not desperate to return to the old job, has a basic interest in receiving the highest possible compensation. In addition, it is important for the employee to obtain the statement of a notified or "orderly" (ordentliche) dismissal which allows him or her to collect unemployment benefits without delay. Because at least three different legal aspects are involved - dismissal with or without notice, compensation, and unemployment benefits - the parties implicitly assume, and often directly ask, for assistance of the labour court judge in formulating terms of a settlement. The active role of the judge is reinforced in negotiations which, according to general procedural rules, should be under exclusive control of the parties (120).

120) Therefore, advocates of increased inquisition in British industrial tribunals, like Williams 1983: 161, might be reminded that in inquisitorial proceedings most likely a considerable number of written documents will have to be exchanged before the hearing which might create even higher barriers for the unrepresented party. The German labour court procedure is to a great extent a procedure in writing and not primarily designed to produce new facts in a hearing as seems to be the main function of the adversarial procedure. The inquisitorial style is hardly the best way to discover something new about the case which has not been hinted at in the documents.

There is some criticism of German labour courts' poor performance in safeguarding jobs, which has been provoked by low reinstatement figures and the common practice of settlement-in-court (121).

Adversary proceedings in British industrial tribunals are not designed to allow much "informal" behaviour of the chairmen or lay members on the bench who represent the employer's or trade union's position. Usually not having much more information than is contained in the standard application and respondent forms, the chairman of the tribunal and the lay members are prepared to hear arguments and review evidence to the extent presented by the parties or their representatives. In the industrial tribunals, the rules of evidence of civil or criminal procedure are not followed in full, but the procedure for cross-examination and the techniques that solicitors and barristers use in ordinary courts are employed in producing statements. Partly because non-lawyer representatives, e.g., trade union secretaries, lack alternative ways of proceeding and partly because their clients also expect an adversary style of processing, there is no real opposition to the introduction of established adversary techniques in the industrial tribunal hearings. Chairmen of industrial tribunals only occasionally adopt an active role by asking a few questions, but lay members on the bench rarely ever do so (122).

To an observer in the courtroom, the differences between interactions of an adversary and that of an "inquisitorial" procedure are remarkable. In a German courtroom, the judge asks most of the questions and usually does not sharply differentiate between statements of law and statements of fact. A formal presentation of evidence is

121) See the debates following the empirical findings of Falke et al. 1981 on low reinstatement figures, some of which are documented in Ellermann-Witt et al. 1983.

122) On the influence of lay members in Tribunals see Dickens 1983b.

avoided unless there are outright contradictions in the briefs, or unless some attorney insists on one, most likely with the idea of getting a higher fee. In chairing the proceeding, the German judge may shift from his role as mediator to that of adjudicator. He does not risk appeal as long as he proposes terms for a possible settlement, and in this sense, thus acts as a mediator. The inquisitorial discretion that he enjoys allows him to shift back and forth between mediation and adjudication, using the letter of the law to encourage parties to settle.

The degree of legalism in court is influenced by legalization of the conflict before it reaches the hearing. In Britain, cases which had little legal contact might be tried in preliminary hearings; the chairman invites the parties to meet for a so-called Pre-Hearing Assessment. In these hearings the chairman offers his opinions on the merit of the case and eventually issues a cost warning. Pre-Hearing Assessments were introduced with the argument that there were too many burdensome hearings of cases without merit. For some chairmen it seems a useful instrument to reduce their caseloads. The practice of holding Pre-Hearing Assessments therefore is not without controversy because the conciliatory agency ACAS views these hearings as intrusion in its domain (123).

French labour court hearings seem to range between German labour courts and British tribunals with respect to legalism in hearings. The atmosphere in French labour courts is influenced by the position and attire of the judges. The French labour court proceeding (conciliation procedure) has been described in the following way: "The parties and their lawyers (who were in full legal dress consisting of black

123) A debate on Pre-Hearing-Assessments, which also documents the ACAS point of view, has recently been published in the DE Gazette. The ACAS position has been presented by Wallace and Clifton 1985: 65-9.. The response from the Department of Employment was given by Smith 1985: 182-8.

robes and white ties) sat round the table with two conseillers, one employer, one employee (who incidentally each wear a medal on a red, white and blue ribbon when they are engaged on official duties), and the legal secretary." (124). It seems possible to speculate that this attire contributes to a legalistic and formal proceeding and, subsequently, is an obstacle to amicable conciliation.

A final measure of legalism is related to the impact of appeal bodies on the labour courts. In Germany, the high valuation of conciliation in court serves as a barrier to legalization of procedures by appellate decision-making. This differs from British industrial tribunals. Because it is a practice in the EAT procedure that the notes of the tribunal chairman are made available to the parties, a reverse effect on the industrial tribunal proceedings probably results from this practice: If no new evidence is generally allowed in the EAT and if the notes of the tribunal chairman, which contain the evidence of the case, can become relevant in the appeal procedure, this fact most likely increases length and the detail of evidence procedures in the industrial tribunals. In addition, the fact that appellate rulings are treated as precedents by industrial tribunals increases formalism and restricts procedural flexibility in a legalistic fashion (125).

Implementation of Labour Court Decisions

In all three countries, implementation of court decisions is mainly left to the parties, especially the employer. There exist no special enforcement agencies attached to labour courts to guarantee compliance. However,

124) Van Noorden 1980: 110.

125) See on the treatment of appellate decisions as precedents and as means for increased legalism Hepple and O'Higgins 1981: 364 and Dickens et al. 1985: 77.

there are procedural regulations in case of non-compliance which have to be mobilized by the aggrieved party separately in all three countries.

The following Table IV-8 gives an overview of success rates and re-employment orders in Great Britain and West Germany. Similar data are not available for France as the law gives the employer a right to oppose a reinstatement order (réintégration) which is in about all cases raised. However reinstatement is enforceable against employer resistance in dismissals of employee representatives (126).

Table IV-8: Rates of Success and Re-Employment in German Labour Courts and British Industrial Tribunals in Unfair Dismissal Cases

	British Industrial Tribunal System 1982	German Labour Courts 1978*
Success of the Applicant in the Decision	30.7%	46.4%
Out of all Applications: Reinstatement/Re-engagement granted by Decision	1.7% (IT)	1.7%
including Reemployment through Conciliation	3.1% (IT+ACAS)	9.0%
	n=11.509	n=97.164
* only unfair dismissal cases		
Sources: The Employment Gazette, Oct. 1983, 449. Falke et al. 1981, Vol.II, 974.		

The applicants' chances of success are lower in British tribunals than in German labour courts. An employee in

126) Moritz 1987: 154.

Germany has a sixty percent chance of obtaining a lump sum settlement by going to court and settling the case in court (see Table IV-7). In the 14 percent of cases which are decided in German labour courts there is an almost fifty percent chance for the employee to be successful; this compares to a 30 percent rate of success in British industrial tribunals (see Table IV-8).

There is little information on the extent to which employers comply with re-employment orders and settlement arrangements to the same effect. The British EPCA 1978 provides that additional compensation will be awarded in case of non-compliance of the employer on request of the winning employee. If the reinstatement order is not implemented and the employer cannot show that it was impracticable to comply therewith, there will be an additional compensation award of between 13 and 26 weeks' pay (127). A 1981 study on the "aftermath" of re-employment orders of the tribunals, commissioned by the Department of Employment, showed that the legal intention is hardly matched by reality. Only five percent of tribunal decisions granted re-employment in the period between 1972 and 1977 (128), and this did not change in the following years (129). In analyzing re-employment orders, the study found that union members in general were more often successful than non-members both in obtaining orders and actually getting re-employed for a certain period. Small employers were less likely to implement any order that was made. But the study also found that 80 percent of the successful applicants who finally got a re-employment order in fact returned to work; their average length of re-employment was over a year (130).

There is no similar study with a special focus on re-employment orders either in Germany nor in France. However,

127) EPCA 1978 s. 71.

128) Williams and Lewis 1981: 6.

129) Dickens et al. 1985: 110/111.

130) Williams and Lewis 1981: 6-11.

in Germany some information was obtained by research which asked parties about their attitudes towards labour court proceedings half a year after their hearing. Parties who had reached settlements in court showed a higher rate of satisfaction than parties who got a decision. Actual continuation of employment during the labour court proceeding or after the hearing was the case in 9 percent of the cases. An analysis of these cases shows that non-dismissal issues and cases from bigger companies were overrepresented (131). In dismissal cases only 1.7 percent of all terminated cases in fact resulted in re-employment (132). Research on the U.S. reports that reinstatement orders of the NLRB are not particularly effective. 80 percent of the cases in which reinstatement was ordered the employee left the company a short time afterwards (133). This seems to some extent different with respect to reinstatement awards issued in arbitration. In these cases the employees actually continued employment and only rarely were dismissed a second time. "On the whole, the post-reinstatement of the grievors did not prove arbitrators wrong in the judgments they made" (134).

Enforcement of orders for payment of money rests in Britain with the county courts. The industrial tribunals themselves have no enforcement machinery. In case of non-payment of the employer respondent the applicant has to initiate a separate procedure with the county court by filling in the special form (Form N 322), filing a copy of the decision of the industrial tribunal and presenting a sworn document (affidavit) which verifies the amount remaining due to the employee. The respondent's goods can be seized by the county court and sold by the county court's bailiff ("execution"). The respondent can also be forced to declare bankruptcy. However, in case of redundancy

131) Schönholz 1984: 475-507.

132) Falke et al. 1981, Vol.II, p. 859.

133) Stephens and Chaney 1974: 25.

134) Adams 1978: 94.

payments, unpaid wages, and the basic award of compensation for unfair dismissal there will be no need to apply to the county court for enforcement since the Secretary of State for Employment is empowered to pay these amounts out of the Redundancy Fund (135).

Comparative Conclusions

The establishment processes of labour courts reveal remarkable divergences among the courts. The oldest labour court, in France, was already established in the beginning of the last century. The employers took the initiative in installing the French labour courts. In contrast in Germany, trade unions and social-democratic governments were the decisive forces in establishing labour courts in the 1920s. In Great Britain, academic experts and the civil service pressed for independent tribunals in the 1960s and beginning of the 1970s, whereas the industrial interest groups and the political parties showed little interest in these institutions. And in the United States, the introduction of private arbitration instead of a system of labour courts after the WW II was the result of general policy considerations of both abstentionist (or pluralist) industrial relations policies and non-recognition of unions as political actors and participants in administrative or adjudicatory decision-making.

Not just short-term politics of either Socialist or Conservative governments are at work when institutions of judicial remedy in employment relations are introduced. The policies of abstentionism and interventionism in the British case, attributed to incomes policy on the interventionist side and traditional industrial relations politics on the

135) See Goodman 1990, paras. 1A-923 to 1A-924.

abstentionist side (136), also apply in the employment protection policy field. Job protection policies oscillate between judicial interventionism by labour courts and utilization of self-regulatory mechanisms of the industrial relations system, i.e., voluntary procedures or informal negotiations. In general, labour courts are not designed to act as a substitute for collective bargaining, but rather to extend protection in fields where collective bargaining does not exist or where it shows deficiencies. Labour conflict institutions are a special form of state intervention which is often characterized by tripartite cooperation of unions, employer associations and the state. For interest associations it is possible to extend influence on regulation of employment relations even beyond collective bargaining through participation in these institutions; and the state gains industrial peace through corporatist structures.

The formal organization of labour courts differs significantly in the countries under comparison. Despite changes with respect to general territorial coverage and concentration of jurisdiction in 1979, a "judgment by peers" is still an appropriate characterization of the French court; the bipartite court consists solely of elected lay judges. In West Germany and Great Britain, the tripartite bench consists of one professional judge and two lay judges nominated by unions and employer associations. The German judiciary has a historical lead of half a century over British industrial tribunals in providing judicial remedies for dismissal conflicts; the German labour courts were created in 1926 whereas the British industrial tribunals effectively began to work only after the defeat of the repressive Industrial Relations Act in 1974.

A comparison of the caseloads reveals that, in total, German labour courts handle three times as many cases as

136) Wedderburn 1984.

French labour courts and almost ten times as many cases as the British industrial tribunals. This difference in caseloads cannot adequately be explained by differences in jurisdiction. French, British and German dismissal laws show some differences with respect to eligibility. British law is more restrictive with respect to obligatory periods of employment before becoming eligible for employment protection (two years) compared to West Germany (twenty-six weeks) and France (one year). Second, although West German labour courts have jurisdiction in collective labour law, these cases amount only to a relatively small caseload of under five percent of cases filed.

The explanation for differences in caseloads has, instead, to be attributed to the differences in mobilization processes, and, furthermore, to the nature of dispute handling at the shop level. It is the general assumption of the present study that a particular interaction between company procedures and judicial procedures characterizes systems of labour conflict resolution in general. Because dispute resolution is conceived of as a process which is divided into phases, the interrelation of procedures, located in these different phases, becomes an important task for research. It is the main aim of the present study to contribute to a proper understanding of interactions between pre-judicial and judicial procedures.

However, even on the level of judicial procedures there are major institutional differences between the countries under comparison. While conciliation in Britain is undertaken by means of a separate service (ACAS), the German and French labour courts are themselves responsible for attempting to get the parties to settle. The German procedure especially, after an initial conciliation hearing before a professional labour court judge, is characterized by a constant intermingling of conciliation attempts with formal litigation, even in the judgment session. This is

enhanced by inquisitorial powers of the judges over the proceedings. Consequently, German labour court judges obtain a high rate of settlements: sixty per cent of all dismissal cases result in some form of settlement, compared to thirty-five percent in the ACAS. In these settlements, both sides satisfy some of their interests; the worker usually gets some monetary compensation, while the employer is protected against future claims and costs. French judges are surprisingly less prone to conciliate, although the procedural provisions would allow for a similar high rate of settlements as in the German case. The formality in hearings seems a major obstacle to conciliation in French labour courts.

The activity of judges as conciliators has to do with the procedural principles of adversarial and inquisitorial process. Hearings before the British industrial tribunals are comparatively formal even though some of the adversarial rituals are eased in comparison with British civil or criminal procedure. Legal representatives in industrial tribunals, who have major impact on the processes of the court, use adversary techniques of the ordinary courts; and the chairmen usually remain passive towards these attempts. It is not surprising therefore that British industrial tribunals have recently been criticized as legalistic. By contrast, the inquisitorial or investigative style of German labour court judges creates a rather informal atmosphere which has the purpose of finding agreement.

In addition, the relatively low success rates of applicants in British tribunal decisions have to be mentioned, which also discourage the bringing of cases to the industrial tribunals. Only about thirty percent of workers who have been dismissed are successful in adjudicated decisions in industrial tribunals, as compared to almost fifty percent in West German labour courts. Combined with the formality of industrial tribunal hearings,

such low success rates put strong pressure on British applicants to withdraw or settle their case already during conciliation.

Finally, low rates of actual re-employment characterizes all three labour court systems. This fact indicates that labour courts in general are not designed to offer employment protection in the sense of job retention for the unfairly dismissed. With respect to this result a "functional convergence" of the French, the British and the German labour courts can be observed.

A systems theoretical socio-legal understanding of labour courts requires a distinction of levels of analysis with respect to system references. At least four levels can be distinguished. There is the level of the political system, on which the historical processes surrounding the establishment of institutions for labour conflict resolution, and the enforcement of governmental industrial policies which regulate industrial relations through statutory intervention are analyzed. Then there is the judicial system, in which the relationship between labour courts and other parts of the judicial system is an important issue. With respect to the industrial relations system both the impact and the instrumentalization of labour courts can be analyzed. And, lastly, with respect to the systems of labour courts themselves internal factors related to the organization of labour courts have to be considered.

The distinction of system references, i.e., the political system, the industrial relations system, the legal system and the labour court system is especially important for comparative analysis. Comparative labour law rightly claims that a proper comparison of labour conflict resolution systems cannot be confined to organization aspects (137). However, a proper definition of the function

137) Cf. Blanpain 1985, referring to Schregle 1979.

of labour judiciaries can also not be confined to an analysis of the industrial relations context alone (138). It has to integrate the studies of the external relations and of the internal structures and processes based on a collection of institutional data in a functional comparative analysis of labour conflict institutions.

The previous analysis concentrated on the organizational aspects of labour courts. They certainly have an impact on other systems. However, the analysis of this impact requires a study of the other systems and thus goes beyond the study of the labour court system. Labour courts need to be accepted both within the judicial system and within the other systems. But the acceptance by others depends to a considerable degree on the smooth operation and reduction of complexity within the labour courts themselves.

138) As Schregle 1981: 27 seems to suggest.

CHAPTER V

LAW AND LABOUR CONFLICT RESOLUTION

The final chapter focuses on self-regulation and reflexive labour law. It will be asked to what extent and how self-regulation can be the guiding principle of the legal regulation of labour and employment conflict resolution. Thus, the following remarks can be understood as a contribution to the establishment of a theory of reflexive labour law, which assumes that labour law is part of an autopoietic legal system.

Labour law, which regulates labour conflict resolution, distinguishes between substantive and procedural labour law. In the first section there will be a discussion of substantive labour law. It is related first to problems of individual labour law or employment protection and second to problems of collective labour law or the law of industrial relations. Employment protection law is introduced in a comparison of the law of unfair dismissal in France, Great Britain and Germany and the respective regulatory attempts in the U.S.. This discussion is followed by remarks on the legal status of collective agreements and shop floor rules. In the second section, procedural law aspects will be discussed with respect to problems of decentralization of decision-making and self-regulation. A number of issues are raised pertaining to the legitimation of procedures, the reintegration of industrial relations at the workplace and the role of procedures and corporatist structures in labour conflict resolution. This leads finally to a discussion on self-regulation and its study in a reflexive labour law conception.

Comparative Dismissal Law

The meaning of law differs among the societal groups regulated by it. Whereas employees understand labour law as a set of rights which protect them, employers see in it restrictions on their decision-making, and labour courts view it as the source of substantive and procedural labour law which defines their jurisdiction, guides their operations and structures their organization. Academic labour lawyers are interested in legal doctrine and the consistency of the substantive law. From a systems theoretical point of view, these different opinions on the meaning of labour law express different system references and thus different constructions of reality which are used to define the meaning of labour law.

For an academic lawyer the fundamental distinction of labour law on the European continent, including the jurisdiction of labour courts, is the distinction between individual labour law and collective labour law. The law of unfair dismissal creates the main legal basis for labour conflict resolution in the area of individual employment protection. The vast majority of cases which the British, French, and German labour courts receive relate to the termination of employment.

In a reflexive labour law concept, the reality of labour law at the workplace as well as within the institutions which implement labour law is decisive for judging the substantive labour law. Furthermore, legal regulation is interpreted in the light of self-regulation of the regulated field. The distinctions between substantive and procedural as well as between individual and collective labour law are considered to reflect doctrinal problems rather than problems of industrial relations' self-regulation. Particularly with respect to unfair dismissal

law, it is important to see the relationship between substantive dismissal law and both the procedural aspect related to the occurrence of dismissal conflicts and to the procedural aspects related to the implementation of a successful dismissal case. In fact, proceduralization of substantive dismissal law can be a yardstick for a comparison of dismissal law based on the reflexive law concept. Particularly interesting are processes of proceduralization within legal doctrine which express increasing recognition of both industrial relations self-regulation and the limited role of labour law (1).

Regulatory Approaches to Unfair Dismissal

On the legislative level the 1963 ILO Recommendation 119 concerning "Termination of Employment at the Initiative of the Employer" (2) has been an important source for legislation on unfair dismissal in the countries under comparison. It was a stimulating factor both for the introduction of new legislation on this topic in Britain in 1971 and in France in 1973, and for the harmonization of the law in West Germany through the revisions of the dismissal protection statute in 1969. The respective statutes were the Law of 13 July 1973, amended by the Law of 30 December 1986 in the French case, the Employment Protection Act (EPA) 1975 and the Employment Protection (Consolidation) Act (EPCA) 1978, as amended, in the British case and the Dismissal Protection Act 1951 (Kündigungsschutzgesetz (KSchG)), as amended by the Arbeitsrechtsbereinigungsgesetz of 1969, in the German case.

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- 1) The parameters for a comparison of unfair dismissal laws, developed by Napier et al. 1982, especially chapter 7, are used as guidelines in the following comparison.
 - 2) The text of ILO Recommendation 119 is documented in ILO 1975: 31-35.

The basic ideas behind the ILO Recommendation relate to a twofold regulatory approach: Employer behaviour in case of termination of an employee is regulated through the prescription of a procedure and through substantive reasons. The procedural approach requires the employer to give notice and to obey a certain notice period, unless there are grounds for a summary dismissal without notice. The substantive approach requires the employer to justify a dismissal with a legally defined reason or just cause. This twofold approach characterizes employment protection against unfair dismissal in Britain, France and Germany.

Nevertheless, the philosophies underlying the unfair dismissal regulations in these countries differ to some extent, as indicated by the basic terms that define the normative foundation of legal judgment concerning dismissals. While in Britain a dismissal is considered to be either fair or unfair, a German dismissal is reviewed in terms of whether or not it was "socially warranted" (3). In France, there has to be an "actual and serious cause" for the dismissal.

Each of these approaches is linked to a different philosophy of industrial relations. The German idea that dismissals should be "socially warranted" implicitly refers to social standards that are established by the industrial partners and protected and supervised by the state. The concept of a "socially warranted" dismissal suggests that the reasons for dismissal must be accepted by a collectivity of actors in the social sphere. It implicitly refers to the consensus established in industrial relations, and thus includes the unions' and the employees' as well as the employers' understanding of social justice.

The British "fair dismissal" concept, on the other hand, refers mainly to management standards of "fairness"

3) Sec. 1 (1) KSchG.

(4); the employer's behaviour is supposed to be reviewed by the Industrial Tribunal against standards which are agreed upon by other employers. Fairness is therefore a concept which is defined with regard to class-biased norms of "gentlemanly behaviour" of a "reasonable employer" (5). The emphasis is on other employers' opinions and not on commonly shared values on which unions and the public at large agree as well.

In France, the rather technical-sounding principle of "actual and serious cause" leaves it largely to the lay judges of the conseils or the professional judges of the appellate courts to adopt a view towards dismissal. The French dismissal law, enacted in 1973, gave rise to discussions of the advantages of an objective or subjective concept of dismissal; the objective concept leans towards the German idea of looking into the social basis of the conflict, whereas the subjective concept leaves the employer's understanding of the factual situation untouched and assesses his conduct purely on normative grounds (6). The principles adopted in the decision-making practice, however, seem to lean to a third position which leaves it to the judges to define the requirements of "actuality" and "seriousness" in a rather case-oriented manner (7).

These differences in the approach to unfair dismissal regulation are related to differences in the relationship between employment law and private law in the three countries. Only in France is the whole area of labour law codified in a general labour law statute (Code du Travail). French labour law nevertheless developed from the Code Civil, and legal techniques still exist to circumvent the unfair dismissal protection by directly applying rules of

4) Cf. Elias 1981.

5) Cf. Bercusson in Drake and Bercusson 1981: 33, Bowers and Clarke 1981 and Collins 1982.

6) Javillier in Napier et al. 1981, 81 ff..

7) Cf. Napier et al. 1983: 81/2.

the Code Civil (8). In Britain and Germany, one finds an interplay of employment law and general private law which affects jurisdiction of the labour judiciaries differently. In the German system, sections on the "service contract" of the Civil Code are still considered as the basis of individual labour law; the employment statutes constitute an application of the general norms of the Civil Code. In the British system, employment statutes are considered as supplements to the common law, but not as replacements for it. Thus, the jurisdictional basis of the Industrial Tribunals is different from that of their German counterparts insofar as it rests solely on these newly established statutes (9). The basic interpretation of the law on employment contracts as it has developed under common law is still left to the ordinary courts in Britain, whereas in West Germany and France the labour courts are granted jurisdiction in all legal matters concerning employment contracts (10).

There is a remarkable trend in U.S. labour law towards employment protection. The employment-at-will concept is gradually eroding. The doctrine of employment-at-will stipulates that employees without contracts of specific duration can be dismissed without notice and the contract of employment can be terminated for "a good reason, a bad

8) Napier et al. 1983: 73-5.

9) A list of 32 statutory jurisdictions of the Industrial Tribunals can be found in Hepple and O'Higgins 1981: 362-4, par. 774. The Lord Chancellor may by order confer jurisdiction on Industrial Tribunals to hear claims for breach of employment contract presently dealt with by the ordinary courts: EPCA 1978 s. 131. Until today no such order has been made; a reason for this lies in the interest of trade unions as well as employers to avoid cross-petitioning in Industrial Tribunals, since it is assumed that this would increase the length and legal complexity of dismissal cases.

10) Sec. 2 (1) (2) of the West German Labour Court Act 1953, as amended, establishes exclusive jurisdiction of labour courts in "civil law disputes between employees and employers resulting from employment relations".

reason, or no reason at all" (11). This doctrine was first challenged by federal legislation which introduced measures against dismissal or discharge for union-related or other concerted activities in the National Labor Relations Act of 1935. Later, then employers were prohibited by federal law related to the Civil Rights Act of 1964 from engaging in discriminatory practices based on considerations of race, sex, age, disability or pregnancy.

In the last few years a number of state legislatures, and federal and state courts have developed legal restrictions on the employer-inspired termination of employment (12). There is a lively discussion on the erosion of the employment-at-will doctrine. The courts have increasingly used contract law doctrine to enforce various alleged express and implied terms of the employment contract. These doctrines include concepts such as work as consideration, promissory estoppel of the job offer, incorporation of employer manuals or handbooks into the employment contract, and an implied covenant of good faith and fair dealing (especially in California law).

Tort law has also been used to establish a concept of wrongful or retaliatory discharge which is considered a violation of public policy (13). Employers are prevented from dismissing employees who are absent from work because of their public duties (for example jury service), who report illegal practices of their company to public authorities ("whistleblowers"), or who refuse to participate in illegal activities of their employers. .

There are also a number of state laws which protect employees. In some states, statutes prescribe "good causes" to justify discharges (for example, Arkansas. Montana,

11) See, for example, Epstein 1989.

12) See the overview of recent legal restrictions on the concept of employment-at-will in Jander and Lorenz 1990.

13) See Hoffman 1983.

Puerto Rico, South Dakota). Five states have enacted legislation limiting the employer's right to terminate large numbers of employees. These are Connecticut, Maine, Massachusetts, South Carolina and Wisconsin. The laws are commonly referred to as plant closing laws. They do not preclude mass dismissals but usually impose notice and/or severance pay requirements before an employer can terminate a large number of employees.

The doctrinal response of academic labour lawyers to the judicial and legislative erosion of the employment-at-will doctrine is somewhat dominated by rather unsophisticated and helpless defences of the doctrine on behalf of employers (14). They reflect feelings of unease among management that wrongful behaviour on their part can lead to costly litigation. The American courts have taken the initiative in regulating the employment relationship because general legislation as well as regulation by collective bargaining or other industrial relations instruments was unable to bring about comprehensive employment protection regulations.

Because the courts used their normal mechanisms of contract and tort law, employers have indeed reason to fear high damage awards. The reform of employment protection could be improved in the U.S. at two levels, if the regulators decided to consider successful examples from other countries. Following clear procedures can be a means to reduce uncertainty on the part of the employers as well as the employees. And it might be necessary to think about a reform of the judicial system. Labour and employment law problems need special judicial treatment in the U.S. as well. It is thus time for labour courts to be introduced in the U.S. (15).

14) See only Epstein 1984.

15) See also Summers 1976.

Eligibility

Eligibility for judicial protection from unfair dismissal is restricted by dismissal legislation. Employers of small firms are, to a certain degree, exempted from judicial review of dismissal decisions. In Germany, only firms and administrations with at least six employees are covered by the employment protection jurisdiction of the labour court (16). In France, the minimum number of employees is eleven. In Britain, access to the judicial review of dismissals from firms with less than twenty employees was excluded in 1980 unless the employee had two years' service; British employees of these small firms may resort to ordinary courts under certain circumstances, but rarely seem to do so. In Germany and France, employees from very small firms sometimes are able to base their claims before the labour courts on general provisions of the Civil Code.

In all three countries, employees with fixed-term contracts are excluded (17). Public employees are eligible for protection in all three countries, but in contrast to Britain, West German civil servants are not; they must file their claims with administrative courts. Household employees are ineligible for protection under the employment statutes in Britain, West Germany and France (18).

16) EPCA 1978 s. 64A (1)(b) and sec. 23 (1). KSchG. These qualifications do not generally apply to British, German or French labour law; they are restricted to dismissal protection jurisdiction.

17) Javillier 1981, p. 304, para. 323; Napier et al. 1982: 77; Zöllner 1983: 233; Hepple and O'Higgins 1981, para. 526, 239.

18) Cf. for Britain Ewing 1982. And for West Germany cf. Zöllner 1983, p. 238. Occasionally there is opposition in the commentaries on German employment protection to the exemption of small employer dismissals from judicial review. See Trieschmann 1982 and Büniger and Moritz 1984.

Jurisdiction is, indeed, further restricted with regard to the qualifying period of employment necessary before a case can be filed. German law requires an employee to have worked for at least twenty-six weeks (19); in Britain, the period was first raised from twenty-six weeks to fifty-two weeks by the Unfair Dismissal (Variation of Qualifying Period) Order 1979 and was further raised to two years by the Unfair Dismissal (Variation of Qualifying Period) Order 1985 for all employees employed after 1 June 1985 (20). In France, the minimum period of employment for making a claim is one year according to the "common law" concerning dismissal (21).

Notice periods for dismissals vary in all three countries according to status or length of employment. In Britain, the employer has to notify the employee of the dismissal one week in advance if there has been less than two years' continuous employment; the statutory minimum period of notice increases by one week for each additional year beyond two years' employment; and if there has been continuous employment for twelve years or more, the period of notice is not less than twelve weeks (22). In Germany, a basic distinction is made between blue-collar and white-collar employees: the latter enjoy a statutory minimum period of six weeks notice but they are allowed to reduce this period to four weeks by individual or collective agreement (23). Blue-collar workers are protected by a minimum period of two weeks, which increases to one month after five years' service and to two months after ten years' service, and finally to three months after twenty years' service (24). It is possible to lower statutory provisions by collective bargaining agreement, and the notice periods

19) Sec. 1 (1) KSchG.

20) S.I. 1979 No. 959 and S.I. Order 1985 No. 16.

21) Javillier 1981: 304.

22) EPCA 1978 s. 49 (1).

23) Sec. 622 (1) of the German Civil Code.

24) Sec. 622 (2) of the German Civil Code.

do not apply to services below three months (25). In France, the law provides a formal procedure to be followed by the employer in case of dismissal rather than definite notice periods. First, the employee has to be invited to an interview by certified mail where he or she is informed about the possibility of dismissal. Afterwards the employee has to be notified about the dismissal, again by certified mail. And thirdly, the employer has to state the reasons for the dismissal in written form within ten days after the employee has requested it (26).

Despite the differences in notice periods, one can recognize a similarity with respect to termination or dismissal without notice in Britain and Germany. In Britain, contract law principles are applied in judging termination without notice or summary dismissal. The implied terms of the contract of employment provide the legal basis on which the employer termination without notice has to be judged, i.e., the reasons for such a form of dismissal must be related to "important" terms of the contract (27). In Germany, a termination without notice (außerordentliche Kündigung, extraordinary dismissal) is also based on general service contract law provisions of the Civil Code (28). The main aspect of this form of dismissal is that it is immediately effective. However, if successfully contested in court, a summary dismissal can be dangerous for the German employer, because there is the possibility of reinstatement orders coupled with severe compensation or back payments. In France, the above-mentioned notification procedure applies to all workers covered by the Law of 1973; the sanctions in case of employer non-compliance, however, seem to be widely disputed

25) Sec. 622 (3) and (4) of the German Civil Code.

26) Cf. the description of the procedure to be followed in Javillier 1981: 304-9.

27) Hepple and O'Higgins 1981, para. 553 ff..

28) Sec. 622 (1) of the German Civil Code.

among the courts (29). The time limit in which a claim can be presented to the labour court also varies among the countries. In Britain, a claim must be filed within three months of the effective date of termination (30). In Germany, the employee has to present the claim within three weeks after receipt of the dismissal (31). However, in case the claimant does not meet the period a special request can be made which has to be filed within six months (32). It will normally be granted if the employee states a reason for the delay.

Reasons for Dismissal

There are few differences between the West German, French and British systems with respect to reasons for dismissal. In all three legal systems, the major reasons are related to the conduct or capability of the employee or to redundancy situations arising from the company's bad economic performance or from changes in the company structure. These reasons cover all employer dismissals which fall within the scope of statutory employment protection. The national employment protection statutes thereby clearly follow the ILO Recommendation that "termination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service" (33).

Dismissals because of redundancy or change in the company structure are covered by a separate act in Britain

29) Cf. Javillier 1981: 309-313.

30) Sec. 67 (1) EPCA 1978.

31) Sec. 4 KSchG.

32) Sec. 5 KSchG.

33) ILO 1975: 3.

and separate procedures in France and Germany. The British Redundancy Payment Act (34) was adopted in 1965, six years before the unfair dismissal protection provisions were enacted as part of the Industrial Relations Act 1971. However, the redundancy provisions do not aim at dismissal protection but rather at fair payments in schemes of redundancy compensation (35). An employee can claim compensation if certain statutory requirements are fulfilled. Redundant jobs must be linked to "ceasement of requirement" and "work of a particular kind" (36). And the employee must be dismissed for reasons of redundancy; in redundancy cases a dismissal is defined in the same way as for unfair dismissal (37).

In France, the "dismissal for economic cause" is regulated by a special act adopted in 1975. It distinguishes between economic dismissal of a single employee and the collective dismissal of a group of workers. In cases of economically motivated dismissals, a prior authorization from the administration has to be granted. The French employer must in these cases first inform the works council, then hear the employee, and thirdly apply with the inspecteur for authorization of the dismissal. After successful application with the administration, the employer can notify the employee the dismissal; the worker then has the right to file a suit with the labour court (38). The procedures for dismissal of ten employees or more are even more strict. The comité d'entreprise may ask for a "social plan"; it is compulsory for the employer to consult the works council and the authority and time limits given to the inspector are generous.

34) The Redundancy Payment Act 1965 is now consolidated in the EPCA 1978, Part VI.

35) Cf. the discussion in Davies and Freedland 1979: 394-424.

36) EPCA 1978 s. 81 (2) and Napier et al. 1981: 45-8.

37) Hepple and Fredman 1986: 165.

38) The procedure is described in Napier, Javillier and Verge 1982: 89 ff..

In Great Britain collective redundancies must be discussed with the workers representatives. If the employer fails to consult them, this can lead to a protective award issued by the Industrial Tribunal on complaint of the trade union. The effect of the award is the suspension of the redundancy action and a right to wages of the employees made redundant. The employer also has to notify the Department of Employment of a prospective collective redundancy action (39).

In West Germany, so-called mass dismissals are regulated by separate provisions of the Employment Protection Act. In cases where changes in the structure of the firm lead to a dismissal of a considerable number of employees, remedies have to be negotiated in a social plan between management and the works council (40).

The ability of an employee to terminate the contract due to unacceptable behaviour of his/her employer, known as the concept of "constructive dismissal," seems to be further developed in Britain than in France or Germany (41).

39) Hepple and Fredman 1986: 167.

40) In Germany, local labour administrations have to be informed in cases of mass dismissal. See sec. 17 KSchG.

41) EPCA 1978 s. 55 (2)(c). A short discussion of "constructive dismissal" from a German point of view can be found in Döse- Digenopoulos 1982, 34/5. Only to a certain degree is constructive dismissal also known in West German law. In sec. 626 (Kündigung aus wichtigem Grund) of the German Civil Code, there is a provision for dismissal without notice in cases of so-called "good cause". This paragraph -- in conjunction with sec. 628 (compensation) of the Civil Code -- legally applies to both parties of the employment contract, but is widely used only by employers. An overview of the few Labour Court rulings on "good cause" in cases involving employee dismissals can be found in Schaub 1987: 622-4, para. 125 (VIII).

Remedies

The major legal remedies granted in the unfair dismissal legislation of the three jurisdictions are reinstatement and compensation. All three systems place strong legal emphasis on re-employment whether at the same job as before (reinstatement) or at a new job with the same employer (re-engagement). However, unlike the United States where, according to an older study (42), an arbitration award in favour of the discharged employee leads to reinstatement in about half of the cases, in all European countries re-employment orders are rather exceptional. This will be discussed later with respect to empirical studies and statistics on modes of termination in labour courts and implementation problems.

A right to retain employment during the judicial proceedings (Weiterbeschäftigungsanspruch) has been discussed almost from the beginning of statutory employment protection. In West Germany, a new situation has emerged since the decision of the "Upper Division" of the Federal Labour Court of 27 February 1985; the Federal Labour Court decided that at least during appeal proceedings a dismissed worker is legally entitled to be actually employed if he or she received a favourable decision in the first instance (43). In Britain, "interim relief", i.e. reinstatement during the legal proceedings, can be granted on special request in cases of so-called "inadmissible reasons" for dismissals which mainly are related to union activity (44). With respect to compensation, British law grants payments only in case of a positive decision of the Industrial

41) Holly 1957. Similar rates of actual re-employment have been reported in Quebec; cf. Napier et al 1983: 172.

43) Decision of the Federal Labour Court of 27 February 1985: BAG Der Betrieb 1985: 55/6.

44) Cf. EPCA 1978 sec. 77-79 and Hepple and O'Higgins 1981: 301/2.

Tribunal on unfair dismissal. French law, on the other hand, allows a modest sum to be paid even if there was an "actual and serious cause" for the dismissal. The French regulation is similar to the practice in Germany, in that in most cases the German employee will get some payments; but it is not so much the law which grants payments but the agreements between the parties reached in court which lead to compensation. And it is likely that the labour court decision may grant compensation instead of reinstatement.

In general, it is possible to conclude that there are slight differences with respect to the concepts of dismissal, whereas the statutory reasons or causes of dismissal are rather similar. In this context it seems useful to distinguish between ideological judicial approaches industrial relations and standards developed in judgments of particular situations. It is generally left to the judiciary to interpret, adjust, and shape the legal norms on dismissal. Basic principles like "fairness" or "socially warranted" grant sufficient discretion to the courts to allow them to establish their own policies in the creation of standards. It lies beyond the scope of the present analysis, however, to make a sufficient judgment about the extent of convergence which occurs between these judicial standards. There are certain indications which make such a convergence plausible (45).

A last remark can be made with respect to the "functional" approach to dismissal laws. A functional comparison of norms would be concerned with the protective function of dismissal law or the extent to which managerial

45) It should be possible to compare German judicial standards, documented for example in Schaub 1987, and British judicial standards on employment law, as they are documented in the annotations of Drake and Bercusson 1981. This comparison might reveal an interesting convergence on the level of judicial decision-making which occurs despite the undeniable differences of judicial attitudes within the British and German legal system.

control is supported or recovered through these norms (46). In general, the functional questions are concerned with the impact of employment protection norms on economic processes. The present analysis does not go so far. It is, however, compatible with the functional approach, since it is also concerned with the application and outcome of substantive dismissal norms with respect to actual processes of labour conflict resolution. Included in the present analysis is a discussion of the status and relevance of remedies, i.e., an evaluation of compensation and reinstatement rates. The analysis of remedies granted by the judiciaries is one important element in the overall evaluation of dismissal laws which generally proceeds by contrasting aims of employment protection laws and actual performance of job protection under these laws.

The Legal Status of Collective Agreements and Shop Floor Regulations

From a private law perspective labour law is the law of the dependent employee. It is characterized by an individualistic approach which concentrates on the contract of employment. This individualistic approach has dominated traditional labour law (47). However, from the beginning of the discussion of a separate field of labour law it has been argued that the civil law approach is inappropriate to the conceptualization labour law. This became especially apparent with respect to collective bargaining and collective bargaining agreements. The discussion of the legal nature of collective communications was a driving force for a legal conception of labour law separate from

46) Cf. Hepple 1980.

47) A good example for the external private law view of collective bargaining is Biedenkopf 1964.

private law (48). Indeed, the legal status of the collective agreement created a number of problems for legal doctrine in most countries. In addition, shop floor regulations agreed upon by unions and management led to debates to transcend the private law approach in labour law.

Since Hugo Sinzheimer introduced his concept of a corporative labour norm contract (49), labour lawyers are used to distinguishing between an obligatory and a normative aspect of collective bargaining agreements. Otto Kahn-Freund (50) has developed on this basis his theoretical distinction of the collective bargaining agreement as a contract and as a code. Whereas the obligatory or contractual element binds the parties to the contract, the normative aspect of the collective bargaining agreement creates a code which governs the individual employment relationship. The collective bargaining agreement as code is incorporated into and forms part of the individual contract of employment, and the wage claim of the individual employee derives from this normative part of the collective bargaining agreement.

This basic distinction underlies the regulation of collective bargaining in Germany (Tarifvertragsgesetz of 1949) and the French regulations on collective bargaining in the Code du Travail. Although similar in theory, the legal status of the British collective agreement differs in practice from the American and most European approaches. Bob Hepple describes the difference of the British collective bargaining agreement as a result of the voluntarist tradition:

"The British approach differs from that in the United States because the collective agreement does not provide all the

48) See the German debate on an independent legal field of labour law since Sinzheimer 1906 summarized in Däubler and Hege 1981 who argue for "eigenständige, vom BGB losgelöste Regeln" to regulate collective bargaining.

49) Sinzheimer 1907/08.

50) Kahn-Freund 1983b.

terms, and from that in most European countries, because the collective agreement does not provide compulsory minimum terms." (51).

The collective bargaining agreement reflects the voluntary nature of British industrial relations. It is not considered a private law contract between the collective parties, and the extent to which the collective agreement is legally binding is debated from case to case (52). This is also a result of the fact that British labour law forms part of a common law system. Efforts to improve the legal status of collective agreements have not been very successful (53). On the contrary the Conservative Employment Act 1980, for example, which removed sanctions on employers in cases of violation of collectively agreed "terms and conditions" (repeal of Schedule 11 of the Labour "Employment Protection Act" of 1975), deliberately weakened the legal status and the regulatory power of collective bargaining (54).

Workers and employers have no right to enforce the collective agreement beyond its express or implied incorporation in the individual employment contracts. However, there is a strong individualist tradition within the common law and its understanding in British courts (55). They have protected the concept of the free labour contract and the freedom of individual parties to contract about all conditions of work despite the collective agreement against collective bargaining or statutory regulation (56). "The idea of positive legal regulation of the contract of employment by imperative norms is alien to the common law approach." (57) The individualist understanding of the contract of employment was responsible for the development

51) Hepple 1983: 402.

52) Doyle 1986: 114-117.

53) Kahn-Freund 1983, ch. 6.

54) Cf. Hepple and O'Higgins 1981, par. 55, p. 32.

55) Hepple and Fredman 1986: 39-41.

56) See Hepple and O'Higgins 1981: 126-131; Davis and Freedland 1984, ch. 4.

57) Hepple 1983: 400.

of labour law outside the frame of the contract of employment. This "atrophy" (58) is held responsible for the fact that legal issues concerning contracts of employment still fall under the jurisdiction of the ordinary courts and not of the Industrial Tribunals in Britain.

Both British employers and unions have maintained their traditional opposition to law with respect to legal regulation of collective bargaining. Together they are largely responsible for the non-binding legal character of the collective agreement. They have always felt that a diverse, local and flexible character of collective bargaining is preferable to legal duties imposed on them by statute. It allows British employers to maintain a high degree of managerial prerogative in company decision-making (59).

However, the policy of abstentionism, i.e., no state regulation or recognition of the collective bargaining agreement, was supported by the unions. They adhered to an ideology of voluntary regulation of industrial relations because they also feared repressive state intervention and the imposition of legal responsibilities on them. In the unions' view, legally binding collective agreements undermine their ability to engage in collective action at any time; unions need this freedom in order to be powerful enough to achieve joint job regulation in a state of truce at the company level.

The legal nature of shop floor rules provides another example of differences of approach in private law and in labour law which are linked to the collective character of communication in industrial relations. Shop floor rules were a major concern in British labour law. Since the Donovan report, employment policies have placed high emphasis on these rules. The legal approach was supposed to

58) Kahn-Freund 1977: 524.

59) Donovan Report 1968, paras. 127/8.

reflect the voluntarist tradition. The solution was the so-called Code of Practice which was designed by a government agency (ACAS) as a model procedure to be implemented by companies.

From a reflexive labour law point of view, the Codes of Practice are a good example of the legal recognition of self-regulation. Their legal status is facilitative. Employers are forced by circumstances and conditions over which they have control to implement the code, but not by force of law. By not following the code employers can take the risk of losing in an Industrial Tribunal.

Shop floor rules have been discussed both in French and in German labour law in a manner rather typical of the analytical tradition of private law doctrine in these countries. The puzzling aspect of shop floor rules for these legal discussions is the source of law. In German legal literature shop floor rules are distinguished with respect to their source of origin. Shop floor rules are either regulated through collective agreement or through statute. A third type of rules exists which creates special problems, i.e. rules which originate from individual legal action but have collective legal effects. For these the following categories have been developed: unified regulation of employment contracts (arbeitsvertragliche Einheitsregelung); company customs (Betriebsübung); and employer's general offer (Gesamtzusage) (60).

Franz-Jürgen Sacker has suggested calling shop floor rules "general rules of work conditions". (Allgemeine Arbeitsbedingungen) for which a separate law should be created, analogous to the German law of general contract terms and conditions (Allgemeine Geschäftsbedingungen) which regulate the fine print in the contract (61). According to Sacker, shop floor rules create a special problem because

60) Zöllner 1983: 67/8.

61) Sacker 1972; Däubler 1986: 97-111.

they are often unilaterally imposed by management on the individual contract of employment. He proposes that they receive special statutory recognition and be subject to review by the courts. They could be challenged on the grounds of unfair restrictions of the freedom both to enter and to carry out the employment contract. The German legislator has not yet picked up on this idea of general rules of work conditions, and statutory recognition of these rules remains scattered.

Procedures, Conflict Resolution and Company Decision-Making

Labour conflict resolution is carried out in procedures. The legal regulation of procedures is traditionally confined to concerns of the legal system. Implicitly the procedural law of labour conflict resolution has always borrowed its rules from other procedural codes. From a reflexive labour law point of view, this can be understood as a self-limitation of labour law to the regulatory concerns of the legal system. Instead the contribution of procedures to self-regulation in other social systems should become a central concern for procedural labour law.

Three aspects in the development of procedures can be emphasized which enhance self-regulation in other systems: decentralization of decision-making; the legitimation capacities of procedures; and self-regulation of the company by reintegration of industrial relations.

Decentralization of regulation of social conflicts is central to a reflexive law concept, and, in particular, to reflexive labour law. Teubner defines reflexive regulation in general by referring to "dezentrale Mechanismen der Selbststeuerung, in denen das staatliche Recht nur die

Rahmenbedingungen reguliert" (62). Conflict regulation in organizations is for him a prime example of decentralized decision-making in an autopoietic legal system (63).

Traditionally, the judicial stage in conflict resolution is seen as the center beneath which other formal or informal procedures are grouped. The traditional approach views the division of labour between procedures from a vertical point of view. It locates procedures at different organizational levels and explicitly or implicitly assumes that hierarchical command and control structures characterize the relationship of procedures as a relation between levels of appeal. The higher (judicial) levels control the lower (judicial and extra-judicial) levels.

In accordance with the vertical view, the relation of extra-judicial and judicial procedures is regarded as a filter system. Negotiation, conciliation and mediation are types of procedures which are designed to sort out the petty problems which would only burden the courts. However, though judicial procedures (and some extra-judicial procedures) are internally hierarchically related, it seems nowadays questionable whether the vertical model should be extended to cover the relationship between extra-judicial and judicial procedures as well. The vertical view is coming under increasing challenge in this respect. Instead, a division of labour between judicial and extra-judicial procedures is emphasized (64), and the relation of these procedures is thus viewed as a horizontal arrangement.

Studies that arrange procedures horizontally draw on the legal pluralist analysis, which views traditional and informal procedures as extra-judicial rather than pre-judicial (65). Instead of focusing on the filter function,

62) Teubner 1989: 85.

63) Ibid: 49.

64) Blankenburg and Rogowski 1983.

65) On legal pluralism and litigation theory see Griffiths 1983.

the division of labour in conflict resolution between procedures is seen as differentiation of procedures along functional lines (66).

The functional view is supported by conflict theories which are concerned with the adequacy of the procedure to resolving the conflict. It has been proposed to evaluate the adequacy of legal procedures with respect to their "proximity to the conflict" (Konfliktnähe). This concept asks whether procedures are 'close' to the social sub-system from which the conflict derives, whether the procedure is able to adequately distinguish the type of conflict and whether it acknowledges the steps in the juridification process of the conflict in which the parties themselves define the dispute (67). Compatible with the horizontal analytical approach, 'conflict-proximity' research assumes that extra-judicial procedures are generally better equipped for many conflicts currently handled by the courts. On this basis it predicts further decentralization of decision-making to extra-judicial fora (68).

Horizontally arranged procedures are generally classified according to the degree of third party influence. Five ideal types of conflict resolution procedure have been distinguished in legal pluralist analyses.

(i) Negotiation: The parties to the conflict or their representatives negotiate face to face. Only the rules and expectations which bear on the negotiations are forms of invisible third parties.

(ii) Conciliation: A third party only facilitates a settlement between the parties by serving as go-between.

66) See Holtwick-Mainzer 1985. On functional differentiation of labour courts see Rottleuthner 1985.

67) Falke and Gessner 1982.

68) Büniger and Moritz 1983 propose differentiation of procedures and decentralized decision-making in line with the concept of conflict proximity for the German labour court.

(iii) Mediation: The third party involved submits a proposal for resolution which is not, however, considered as having a binding effect.

(iv) Arbitration: The award of the arbitrator is binding on the basis of a prior agreement between the parties to submit to arbitration. The parties might have discretion in choosing an ad hoc arbitrator.

(v) Adjudication: Once the conflict is submitted to adjudication the parties lose control over the procedure. They are bound by the procedural rules in seeking conflict resolution.

Legal pluralist decision-making in decentralized procedures is in fact not a new phenomenon. In his article on "Special Courts, Special Law: Legal Pluralism in 19th Century England" (69), Arthurs has traced early examples of decentralized decision-making in the English judicial system. His analysis of local courts in 18th and 19th century England criticizes the dominant views on the hierarchical organization of the legal system. He offers an alternative view:

"... local and special justice collided with the cherished assumptions of common lawyers about the inherent desirability of a unified, hierarchically organized, legal system. ... As the organizing principles in the design of a new system of conventional courts, unity and hierarchy may perhaps be at least defensible, if not inevitable. But as descriptions of the past they are misleading, and as prescriptions for the future allocation of caseload ... fatally inadequate." (70)

Furthermore, despite suppression of special courts, Arthurs argues, commercial arbitration, government inspectorates and commissions have always been used regardless of the dominant political and ideological views on the proper organization of the judicial system. "De

69) Arthurs 1984.

70) Arthurs: 403-4.

facto, not de jure, (legal) pluralism survived and indeed flourished." (71). Arthur's discovery of autonomous decentralized judicial decision-making is thus not just a historical reminiscence of the last century.

The material presented in the previous chapters reveals several examples of decentralized decision-making both within the judicial system and in extra-judicial procedures.

At the judicial level, courts and in particular labour courts in France and in Germany are characterized by procedural pressures to seek conciliation at every stage of the procedure. Only the parties can ultimately decide on this option of a conciliated or mediated settlement, though they often do so with the active encouragement of the judge (72). This to some extent delegates decision-making to the parties themselves. A settlement reached in conciliation cannot be appealed, and therefore removes the dispute from the legal system at this stage. This courtroom conciliation is a rudimentary form of decentralized conflict resolution within the judiciary.

Luhmann's theory of procedure utilizes differentiation theory and the concept of an interaction system.

Decentralization of decision-making can take the form of formal delegation of decision-making to extra-judicial conflict resolution processes. Company level procedures are usually based on negotiation and arbitration. Outside the company, extra-judicial procedures involve conciliation, mediation and arbitration procedures (73). In looking at

71) Arthurs: 407.

72) Rogowski 1982.

73) Rottleuthner makes a useful analytical distinction of three types of procedures which are located between company level and labour courts: collective extra-company procedures (arbitration); administrative extra-company procedures (safety and health agencies, chambers of commerce) and pre-judicial procedures (legal departments of interest associations, law offices). See Rottleuthner 1984c: 350.

decentralization or delegation of decision-making to extra-judicial procedures, some results of the comparative analyses on autonomous decision-making and procedural differentiation might be presented to indicate the extent of legal pluralism in labour conflict resolution in the various countries.

The U.S. grievance procedures with final and binding arbitration concentrate the settlement of disputes on an intra-company, on-the-spot and private level, free from both state intervention and judicial review. This grievance arbitration system is given a high degree of autonomy. Supported by the courts and by administrative agencies, the federal government has delegated most decision-making powers in employment conflicts to private arbitration. And the main actors, i.e. management, unions and arbitrators, actively engage in maintaining decentralized decision-making at local company level.

Freeman and Medoff have argued that the new non-union grievance procedure systems which some U.S. companies have introduced must still be understood as responses to union supported grievance arbitration systems (74). However, I would suggest that the relative success of grievance arbitration regulating shop floor affairs, rather than union pressure has inspired union-free companies to engage in joint employee-management cooperation in order to solve their conflicts .

The American company grievance procedure, which is set out in a collective agreement concluded between management and the local section of only one union that has won the elections at the company level and thus serves as exclusive bargaining representative, forms an elaborate decentralized system of labour conflict resolution. This system is characterized by both a high degree of formalization of the

74) Freeman and Medoff 1984: 154.

procedure and sensitivity towards collective interests. As the collective parties remain ultimately in control of regulation of their affairs it is a clear form of self-regulation by joint decision-making.

From the perspective of individual employees, however, the formalized character of company grievance procedures with different steps to be followed may turn into a series of elaborate barriers. A major obstacle to the individual employee initiating conflict resolution on his own behalf might already be the decision of the shop steward to process the case in view of the collective control of the procedure (75). These formalized procedures thus encourage informal settlements through a "deterrent effect" with respect to costs, delay and formal behaviour. Thus, the formal grievance procedure has to be viewed as background and instrument for reaching informal settlement (76), similar to the role of law and courts in creating the necessary background for out-of-court settlements.

American grievance arbitration is a good example of 'juridification at a decentralized level'. American arbitrators increasingly use judicial standards to conduct arbitration hearings and in making awards. The leading textbook for American arbitrators concludes with an appraisal of the close relationship between 'rights arbitration' and the American formal legal system. It praises American arbitrators for "effectively utilizing established legalisms without paying slavish deference thereto." (77) Decentralized decision-making is reinforced by the control the parties exercise over the procedure including, significantly, the choice of the third party. The arbitrator has a relatively weak organizational status

75) See only Rogowski 1983b: 211.

76) On the extent and forms of informal norms, procedures and behaviour at the workplace see Dombois 1982 for Germany; Dezalay 1985 for France; and Terry 1977 for Britain.

77) Elkouri and Elkouri 1985: 852.

compared with a judge. Only if negotiations fail do the parties appoint the arbitrator "ad hoc"; his weak organizational status is illustrated by the fact that he hears the case on the company premises, and that after he has given his arbitration decision he has virtually no further authority. Astonishingly, this weak organizational status, in general, causes no observable harm to the reputation of the arbitrators. American arbitrators receive their high social status from careers in other capacities.

Great Britain has successfully implemented dismissal procedures at the company level, which sometimes allow joint decision-making but "remain for the most part managerial procedures, devised and operated by management, without an independent appeal stage." (78). The official government agency ACAS facilitates settlements not reached in the dispute procedures through the active assistance of a neutral official who sees the parties on his own initiative. Usually, however, the employee has already filed a claim with the Industrial Tribunal at this stage.

Increasing decentralized decision-making activity in dispute procedures at the company level can be observed in Great Britain in the increase of (more or less) mutual agreements over dismissal. This trend underlies the growing number of non-IT-1 petitions filed directly with ACAS by employers who seek to ratify dismissal agreements independently reached by the parties. These petitions, once ratified, exclude the possibility of subsequent tribunal complaint. As a percentage of ACAS individual conciliation cases non-IT-1 petitions have increased from 2 percent in 1976 to 32 percent in 1987 (79). Rather than limiting the scope for decentralized decision-making, ACAS is being instrumentalized to make decentralized decisions binding. In addition, the thesis can be propounded that the rigid and

78) Dickens et al. 1985: 238.

79) ACAS 1988, ch. 6.

time-consuming judicial proceedings at the Industrial Tribunal level have a certain "deterrent effect" on both employer and employee which fosters their propensity to reach an amicable agreement.

Another example of decentralized decision-making, in West Germany, are negotiations between the works council and management and the arbitration committee (Einigungsstelle). In case of disagreement over the enforcement or interpretation of dismissal of a group of workers, the works council or management can call for arbitration which eventually leads to a hearing before a tripartite bench. Arbitration committees at the company level increasingly handle conflicts which could go to the labour courts. It is said to be adopting increasingly judicial standards (80). Thus, although arbitration committees are as independent as their American counterparts they show a similar tendency of legalism which derives not least from the participation of labour court judges as arbitrators.

The German arbitration committees have recently encountered some criticism about the high costs resulting from high fees for the arbitrator. Considering that most arbitrators are in fact labour court judges, it has recently been suggested that the Association of Labour Court Judges (Deutscher Arbeitsgerichtsverband) should design guidelines for arbitration fees (81). A more fundamental criticism, reminiscent of the relentless critiques of American Critical Legal Scholars of grievance arbitration, has been made by Erd.

He criticizes the fact that the participation of management in decision-making limits the enforcement of labour's rights in general. Hearings and negotiations in front of the arbitration panel are criticized for being private and not public. And the existence of judicial

80) ACAS 1985: 64 and 1988: 56.

81) Hartmann 1987.

review is excluded (82). Däubler rejects some of Erd's points and takes a more optimistic view with respect to the potential use of arbitration committees by collective and individual parties. He points out that the committee is free to decide on a public hearing and that the collective parties can agree in the company agreement that public access to the hearing is guaranteed at any time (83).

In general Germany is undergoing decentralization with respect to its collective bargaining system. Regional and industry-wide collective bargaining are declining to some extent and company agreements are on the rise (84). Conflict resolution mechanisms at the company level will have to be reformed to take up the function of an immune system of the collective bargaining system at the company level.

West German disciplinary procedures (Betriebsjustiz) are also an example of the decentralization of decision-making in large firms. Research on these disciplinary procedures found a multitude of work rules and formal procedures for dealing with deviant employee behaviour at the level of personnel management of large companies. However, it also reports that extensive customs and practices of discretionary justice guide disciplinary actions at the lower company levels of first-line supervisors (85). Thus most disciplinary conflicts are decentrally decided in informal procedures.

A comparison of the forms of procedure shows that the United States places a high emphasis on company negotiation systems and that procedurally, the U.S. has developed a

82) See Hanau 1983: 263. There are however many other proposals how to regulate arbitration fees in west Germany.

83) Erd 1978: 84-86.

84) See only Buchner 1990: 17-18.

85) Kaiser and Metzger-Pregizer 1976: 102. Däubler 1985: 425.

highly decentralized system. Great Britain has a mixture of centralized and decentralized decision-making. And Germany maintains a highly centralized system focusing on judicial decision-making but is developing certain tendencies towards decentralized decision-making in arbitration committees and disciplinary procedures at the company level. And even France has recently started to foster decentralized decision-making by strengthening the position of personnel delegates and enterprise committees. They are becoming bargaining agents and consultative bodies in company decision-making and conflict resolution at the workplace.

There are signs that the labour law system realizes the needs of the industrial relations system for self-regulation. Ulrich Goll (86) has analyzed a practical aspect of the proceduralization of arbitration as a result of judicial policies. According to his analysis of German law, both the legal doctrine and the judicial policy of the Federal Labour Court have created legal structures of conflict resolution and collective bargaining which favour procedural requirements over substantive conditions. In particular the concept of power parity (Kampfparität) indicates a withdrawal of substantive welfare state intervention in favour of procedural solutions which are not only acceptable to the negotiating parties but also compatible with major structures of the collective bargaining system and principles of the welfare state representing the public interest. In addition "power parity" is a legal concept which establishes a "sound" basis for judicial review of industrial actions accompanying collective bargaining. Inherent in the concept of power parity is the tendency to favour compromise over "all or nothing" decisions.

Decentralization in employment conflict resolution has an impact on labour courts. Decentralization of decision-

86) Goll 1980.

making does not challenge judicial values. It does, however, develop into polycentral decision-making which replaces legal reasoning with other forms of reasoning adequate to the new centers of social bargaining. Judicial decision-making is in some cases suspended when in decentralized, horizontally arranged fora a settlement is attempted. Nevertheless, judicial decision-making is also reinforced by decentralized decision-making. Labour courts are accepted in certain circumstances to act as third parties whose role is to provide specialized knowledge on legal questions. Thus the legal character of labour courts will become more important for institutions of decentralized decision-making than their conciliation function.

Self-Regulation and Legitimation by Procedure

The analysis of procedures has gradually changed its framework. It has moved from analyses of procedural norms to studies of the participants to analyses of legal procedures as complex social institutions. Modern research takes both a broader and a more precise viewpoint with regard to legal procedure as social institution. The context as well as the internal operations of procedures are studied.

With respect to differentiation theory, Luhmann argues rather formally for procedural differentiation of judicial and extra-judicial procedures. Judicial procedures should be restricted to rule application. Mediation, conciliation or arbitration should be excluded from judicial procedures. Luhmann has argued many times that judicial conflict resolution should refrain from broad considerations of factual conflict matters and that it should only be concerned with strictly legal questions (87). Arbitration or mediation in the courtroom is seen by him as a "perverse"

87) See only Luhmann 1974: 31 ff and 1986a: 28 ff.

form of adjudication because it neglects basic dimensions of the judicial process. Settlement attempts in the courtroom are only viewed in this perspective as "episodes" and part-time suspensions of the real tasks of the judicial and legal system. Luhmann maintains that the judicial procedure remains the center of conflict resolution after the social conflict has been transformed into a legal conflict.

Luhmann analyzes procedures as interaction systems. He has contributed an important aspect of the self-regulatory mechanisms of procedures as interaction systems. This aspect relates to their capacity to legitimate both the procedure itself and the decisions reached in the procedure (88).

Luhmann analyzes procedures as systems of social interaction. Modern procedures are characterized by role division, external control through programs and a neutral third party. A modern procedure distinguishes between the roles of the participants. These roles are not defined by the social status of the participants but instead by the structure of the procedure. Modern procedures achieve autonomy by gaining control over the evidence. In autonomous procedures the assessment of the evidence is linked solely to the evidence presented during the procedure. However, modern procedures are externally controlled and guided by programs created separately from the procedure. Thus procedures for dispute resolution apply programs but do not create them. If decision-making in the procedure is handed over to a third party, this party is given a neutral role.

Luhmann's system theory of procedure banishes the question of the adequacy of the procedure for conflict resolution into the "environment" of the system 'procedure'. As with other systems, procedure is generally characterized by its ability to draw boundaries with the environment. Autonomy is won by the procedure in the processes of

88) Luhmann 1978a.

distinguishing itself from the surrounding world. Conditions for relatively autonomous procedure are: a certain time period for processing information; a general guarantee of procedure and freedom of decision-making; a distinction between normative and factual questions; and premises for the decision which are not predetermined.

Autonomous procedures develop networks between the professionals, which Luhmann calls contact systems. They have their own structures and rules. The so-called "Gesetz des Wiedersehens" or law of meeting again among professionals forces the decision, and even procedural events, to relate to events in other procedures. The recognition of constellations of power and many other factors result in an increase in procedural complexity. Therefore contact systems have a tendency to settle the dispute informally outside the procedure (89).

Luhmann sees the real benefit of procedure as the creation of "the readiness of the citizen ... to accept decisions independent of content and reasoning -- not necessarily also as correct" (90). This process of legitimation by procedure relates to the way in which the roles, defined by the procedure, are assumed by the various parties. Role assumption implies the recognition of the role of the other party, and thus results in a "constraint" (91) on the personality, which ultimately leads to the acceptance of the decisions.

The permissible conflict in the procedure is designated by Luhmann as a verbal dispute. It is crucial for the judicial procedure that there is no predetermined decision. The conflicting parties have to act in procedural roles, a

89) With respect to judicial procedures Luhmann, a former administrator and trained judge, considers informal or out of court settlements to be "dubious". See Luhmann 1978a: 80.

90) Luhmann 1978a: 82.

91) Luhmann 1978a: 87.

condition which places restrictions on their behaviour. Procedures require consistent presentation of information from the parties to create a valid basis for decision. Continuous party presentation leads to the development of a case history which constrains further procedural development. However, Luhmann recognizes limits to the learning capacity of the parties. He concedes that inner conviction or positive recognition by the parties of a success or defeat in the decision is a rather improbable result in conventional procedures. The real benefit of a procedure is, from a sociological view, the "absorption of protest" (92). Luhmann's systems theory asserts that the modern procedure has an overall legitimation benefit in that it serves the purpose of social learning. Successful learning has taken place when expectations have changed regardless of personal approval of outcomes.

Teubner has used Luhmann's concept of procedure in his analysis of the legal system. He argues that the legal system itself "learns" through its procedures. Teubner considers legal procedures the place of "ontogenetic learning" where the legal system experiences the real world through variation of norms and selection by decision. As procedures are limited in their ability to retain experiences in a "procedural history", the legal system provides legal doctrine which is the subject of communication in a "second circle":

"Das Rechtsverfahren ist sozusagen das Experimentierfeld des Rechts, in dem Normzumutungen als Variationsmechanismen und Rechtsentscheidungen als Selektionsmechanismen zusammenspielen. Über die Retention entscheidet erst der zweite Kommunikationskreislauf, (comma added, R.R.) in dem über die Tradierung der Rechtskultur verhandelt wird." (93)

Differentiation of legal procedures is thus for Teubner a result of legal self-regulation. Procedural improvements

92) Luhmann 1978a: 116.

93) Teubner 1989: 77.

attached to the judicial system are exclusively internal affairs of the judicial system, i.e., 'internal variation of access to justice conditions' (94). Nevertheless, it still remains a normal task for the legal system regulate other subsystems, for example through prescription of procedures. Teubner views procedural regulation as the major form to which legal regulation will increasingly retreat in the future.

Luhmann's system theory of legal procedure is preoccupied with legitimacy as procedural benefit. It neglects a whole range of socio-legal aspects and functions or performances of procedures. In particular, the possibility of settlement by consensus during the procedure is largely neglected, because procedures are conceptually aligned toward decision-making. Luhmann's analysis concentrates on legal procedures. However the effect of procedures on extra-judicial bargaining processes remains outside the picture. Social structural selectivities which relate to variations in both disputes and parties to the disputes are underrated in determining performances and systemic characteristics of procedure. The case history or the "history of the procedure" is analyzed solely from the perspective of decision-makers who control the procedure. It underrates dynamic aspects of courtroom interaction and strategic control by the parties and their representatives. In general, Luhmann's system theory of procedure neglects a study of the interrelated interactions in the courtroom working group.

To reach a general theory of procedure, Luhmann's concept has to be transcended into a theory of legal procedure as social discourse. Social discourses are analyzed as communication systems. The maintenance of communication creates the basis for self-reproduction and

94) Teubner 1989: 101.

autopoiesis. And it creates the basis for dispute resolution.

However, discourse theories have so far taken another line of argumentation. They criticize systems theory for denying the relationship of norms and procedures to moral questions of justice and the need for normative justification (95). The differentiation of truth and procedure, which systems theory views to be a result of procedural complexity, allows one to analyze only conditions of 'just' decision-making. For discourse theories, legal procedures remain ultimately instruments dependent on argumentation about moral issues and just and right behaviour to justify decision-making (96).

So far, legal procedure as discourse is a philosophical and not an empirical concept of procedure. The idea of discourse is derived from, and linked to, the idea of an "ideal speech situation". Habermas invented this concept as a way to solve normative conflicts. Disputants enter an imagined procedure in which the validity of a normative claim is challenged. The potential disputants are forced, in this discourse, to argue. Central to the "regulatory idea" of discourse is the belief that the best argument will eventually win and convince the opponents. The discourse as ideal speech situation is said to guide implicitly all argumentation over normative questions. Habermas goes even further to argue that ordinary language is dependent on there being the possibility of such a discourse. The possibility of entering a discourse in case of conflicting claims about the validity of the speech act serves as a normative guideline and metaconcept in each speech act (97).

The concept of procedure as discourse has been applied in a study of forensic communications. Hubert Rottleuthner

95) Alexy 1978: 164.

96) Günther 1988.

97) Habermas 1971.

has analyzed interactions in political trials. He interpreted events in these judicial procedures as "systematically distorted communication" (98). Judicial interactions are viewed as distorted by "asymmetrical" structures in legal procedures and the "pathological" roles of the decision-makers. Rottleuthner overlooks the fact that judicial communication is to a large extent only a discourse among professionals and not meant to convince lay participants.

Rottleuthner's analysis is guided by a concept of undistorted, "symmetrical" communication, from which interactions and structures of actual legal procedures are criticized. This normative concept conflates system references by assuming an overarching model of "symmetric" communication. Habermas' discourse theory refers in this context to life world structures in which the systemic discourses are embedded (99). Their idea of legal procedure as discourse suggests including in the empirical study of procedures the normative intentions underlying strategic interactions which are guided by moral considerations of justice and fairness. However, their normative concept of procedure as discourse has to be integrated into an analysis of communication processes which guarantee self-reproduction of the procedure.

98) Rottleuthner 1973: 158-167.

99) See Habermas 1981.

Proceduralism and Reintegration of Workplace Industrial Relations

Labour law and labour conflict resolution in decentralized bargaining systems are linked to the structure of the company or corporation. There are a number of new interpretations of the nature of corporations. James Coleman, the scholar known for his important studies on corporate actors, distinguishes relations of the corporation to natural persons and positions. Accordingly, the first set of relations is called "positional" rights and the second set "contractual" rights. However, Coleman's analysis is limited by his adherence to a strict rational choice approach in conceptualizing the modern corporation as a corporate "actor". Nevertheless, we can reconstruct his distinction of positional and contractual rights as indicating self-regulation and external legal regulation of the corporation. Coleman sees changes in the conception of the corporation which are related to different notions of the relation of external regulation and self-regulation.

"The modern corporation can increasingly be seen not as a machine with parts but as a system of action comparable to an unconstrained market, a system where organizational structure lies in defining expectations and obligations and not exercising authority, but in structuring reward systems and providing resources." (100)

Nevertheless, his analysis of the corporation as a system which defines expectations, structures and reward systems, and which provides resources, points in the right direction. The corporation is an organization which regulates itself, for example, by integrating self-regulatory mechanisms at the shop floor. The new corporation discovers the human factor as a collective resource. Workplace industrial relations are recognized in

100) Coleman 1990: 436.

their productive capacity. Unions, employees, management and the state (labour inspector, labour administration, tax authority etc.) form producer coalitions.

Coleman discusses German co-determination as a model which parallels autonomous evolutionary development elsewhere. However, his description of German works' councils is woefully misinformed. His treatment of comparative industrial relations reveals a superficial use of empirical information on foreign countries throughout his book.

Wolfgang Streeck has analyzed changes in the work-place industrial relations system which result from a shift in status and contract relations of employees and employers and which suggest retreat to proceduralism in regulating industrial relations. Streeck (101) sees the challenge of the Japanese style of production to Western pluralist and corporatist economies in the functional reintegration of industrial relations at the workplace. As the motivational factor becomes an economic factor once again, regulation of workplace industrial relations is increasingly seen as an important management task. Countries with traditionally low rates of unionization like the U.S. have witnessed a boom in so-called human resource management techniques (102). One consequence of the reintegration of industrial relations matters into company strategies is the reemphasis on a flexible individual employment contract. Employees become more directly "coupled" to the economic fate of the company.

Reintegration of industrial relations within the company poses new challenges to labour law. External regulation of company affairs (including workplace industrial relations) has to take into account a "shift from

101) Streeck 1991.

102) On the effect of human resource management systems and other non-union models on American industrial relations see only Kochan, McKersie and Katz 1986.

'external' market coordination to 'informal' political processes" (103) in the company organization. Self-regulation of workplace industrial relations is no longer carried out in an autonomous subsystem. Control of self-regulation at the workplace increasingly means control of conscious decision-making in vital company affairs. In fact, with human resource management companies are attempting a new form of self-regulation which demands from labour law and from unions a new emphasis on representation of the employee as an individual.

If self-regulation of workplace industrial relations means their reintegration into the company culture, this demands new forms of external regulation through procedures. In traditional labour law terms, it demands procedures which do not replace custom and practice but are designed to control self-regulation "in circumstances where power conflicts are endemic" (104). Labour law would encounter regulatory failure if it intervened in reintegration processes with substantive demands. The new development of company industrial relations calls for a cautious retreat to proceduralism in this respect.

Unions have few choices but to engage in representation of the individual employee when workplace industrial relations are reintegrated into the core of the company, i.e., production. However, the traditional forms of collaboration between unions and management seem to some degree inadequate to this task. Regulation of new workplace industrial relations challenges labour law to offer additional procedural forms, thus demanding procedural differentiation at the workplace. In fact, retreat to proceduralism means an increased demand for new procedures. In these new procedures, which might be installed independently of co-determination bodies, individual

103) Teubner 1987a: 37.

104) Bercusson 1987: 77.

employment conflicts could be handled unequivocally. Furthermore, these procedures would be designed only to create the shadow for negotiations. They become an instance of last resort for self-regulation and they are only invoked if negotiations fail.

In his comparison of American grievance procedures and German participation schemes, Herding showed that the two systems of grievance handling at the shop floor are far from balanced systems of self-regulation. In contrasting the two systems of grievance procedure and works council participation with the respective ideals of "job control" and "co-determination", he predicted as early as the beginning of the 1970s "heightened workers' aspirations for self-determination on the job, as well as active management reactions to maintain authority" (105). Unions will face demands for autonomy and discretion from individual workers, work groups, and plant or local bodies.

The 1980s have witnessed massive setbacks for the union-controlled systems, and serious debates about alternatives to unionization have begun. Kochan, Katz and McKersie have outlined likely alternatives to a collective bargaining system with union participation. They assess the non-union models which were introduced in several major companies as a conscious and largely successful effort by the employers to engage in human resource management.

"The new nonunion model consists of personnel systems that either match union wage and fringe benefit levels in labor markets where unions dominate or pay wages higher than competitive norms in rural or southern labor markets (but wages lower than the union rates found in the more highly unionized markets). At the workplace, the new personnel systems emphasize greater flexibility in job design and work organization, more extensive communications and participation in task-related decisions, and other behavioral science strategies designed to increase the

105) Gessner reports that Mexican labour courts also handle only very few cases that arise from continuing employment. Gessner 1976: 227.

commitment, loyalty, and job satisfaction of employees. As a result, employees have fewer incentives to unionize." (106)

The validity of the reintegration thesis as a universal trend applying to all companies, regardless of size, can be called into question. It seems somewhat doubtful that medium-sized or small firms have similar options for reintegration to those of multinational and large national companies, leaving aside the question of whether workplace industrial relations were ever differentiated. It makes an important difference if procedural regulation means control of self-regulation or control of unilateral decision-making by a small entrepreneur. Whereas early judicialization of employment conflicts in large companies might only disturb self-regulation, in small firms it often is the only option and can rapidly lead to overcoming the stalemate and the loss of communication in the personal reemployment relationship resulting from the disciplinary or dismissal action. The finding that employment conflicts of small firms are over-represented in German labour courts suggests a differentiation of judicial procedures for claims arising from small and from large companies (107). Regulation of conflict resolution at the judicial level might therefore lead to demands for procedural differentiation according to the degree of prior juridification of employment conflicts. Retreat to proceduralism at the judicial level thus can also mean new procedures.

106) Herding 1972: 350.

107) On the differentiation of claims from small firms and large companies see Blankenburg, Schönholz and Rogowski 1979: 69- 73. Procedural differentiation for the different conflicts has been suggested by Bünger and Moritz 1983: 183.

Corporatist Arrangements in Grievance Procedures and Arbitration

Grievance procedures for employment conflicts, which operate as negotiation systems between employer representatives and management at the plant level, can be conceptualized as micro-corporatist arrangements. Although the state usually does not directly participate in these procedures, they are state-sponsored fora. In various forms, the state compels management and unions to negotiate about shop-floor problems. The legal recognition itself is a form of state participation. Furthermore, these negotiation systems are sometimes introduced on the initiative of state policies and their implementation and operation is monitored by state agencies. Thus the state takes part in various forms as a third party and it is justified to view these procedures as corporatist arrangements at a micro-level.

Comparative accounts of the involvement of governments in dispute resolution, at the plant level and in bargaining, describe tripartite cooperation with an active role for the state as a developing international trend in industrial relations (108). In particular the capacity of corporatist arrangements not only to solve but "to prevent open conflict or to limit it as far as possible" (109) is emphasized. Corporatist arrangements are thus an alternative to the 'negative devices' of simply excluding certain industrial activities or repressively limiting the possibilities of industrial action (110).

108) See Bean 1985: 122-4; Bamber and Lansbury 1987:20.

109) Hanami and Blanpain 1984: 2/3.

110) On the preventive function of the German model of co-determination for conflict resolution see Weiss, Simitis and Rydzy 1984: 87.

In Germany and France, corporatism underlies regulatory schemes of the company constitution and statutory participation rights of worker representatives. In Great Britain and the United States, company procedures are enhanced either directly, through the issuing of Codes of Practices, or indirectly, through administrative control of the recognition of union bargaining representatives in collective bargaining at the company level.

Conciliation, mediation and arbitration in collective (or interest) labour conflicts, as distinct from grievance procedures, also operate independently of labour courts. The corporatist structures of these collective conflict resolution mechanisms depend on the scope of the conflicts. Whether collective bargaining or a strike is carried out on national, regional or local level will obviously influence the level of third-party intervention and the extent of cooperation between the industrial parties and the state.

France: "Administrative Corporatism"

It is the far-reaching, although recently limited, power of the external inspecteur du travail which lies at the center of 'administrative corporatism' in France. The inspecteur monitors cooperation and regulation at the workplace and, in case self-regulation is not successful, can always be called in to intervene in situations of stalemate. Moreover, he also has the right, derived from his original function as supervisor of health and safety matters, to enter the company at any time and intervene on his own discretion. The threat of interference may even have a preventive effect leading to reconsiderations on the part of the management.

For a long time, the extensive powers of the labour inspector characterized French micro-corporatism as forced rather than voluntary tripartite cooperation. The obligatory involvement of the administrative inspecteur du travail in employment conflicts offered the state a powerful means of intervention. This administrative approach to conflict resolution revealed a form of authoritative corporatism which has a tendency towards control rather than cooperation in labour relations.

The French industrial relations system has been strengthened in the work place with the enlargement of the conflict resolution functions of personnel delegates and enterprise committees in 1986. The powers of the inspector were reduced. It is now also true of French micro-corporatism that the success of conflict-preventive control by corporatist structures rests on participatory rather than authoritarian attitudes. In a bureaucratic institution, much depends on the informal behaviour of the parties, including the collective parties. Whereas previously, French administrative corporatism relied on informal networks established between the inspector and the industrial relations actors and thus depended on mutual trust relationships, it now can evolve into more cooperative relations in which bargaining prevails over implementation of authoritative decisions.

As previously mentioned, interest conflicts are settled either in obligatory conciliation or in facultative arbitration and mediation procedures (111) which are also characteristic of French etatist corporatism. The limits of administrative corporatism are reflected in the declining use of these procedures (112). French corporatism is moving away from administrative corporatism.

111) See the figures on declining use in Blanc-Jouvan 1971: 59, Table 2 and Javillier 1981, 596/7.

112) Stone 1981; Klare 1978; Getmann 1979.

United States: "Passive Corporatism"

Unlike the French preference for state intervention, negotiations in grievance procedures, eventually leading to private arbitration, are the preferred method of solving labour conflicts in American companies. Company dispute procedures create autonomous centers for decision-making and conflict resolution. The state remains apparently passive. However, there are elements or residual forms of corporatism in American labour policy and the state support given to these private institutions which can be labelled passive corporatism.

The abstentionist national policy towards workplace industrial relations in the U.S. is expressed in the limitations placed on judicial and administrative review of arbitration awards as well as other tendencies of non-intervention, for example the refusal of American policy-makers to enact unfair discharge legislation. The Labour Management Relations Act of 1947 and the Steelworkers Trilogy of the Supreme Court, as well as NLRB decisions on deferral and preemption, are concerted and conscious efforts to delegate decision-making to grievance arbitration (113). The judicial system offers support in enforcing arbitration awards without review of the merits of the case (114).

Although private, these arbitrations enjoy public attention. For example many awards are said to be published for reasons of "predictability" of decision-making so that previous arbitration awards can be used as precedents like decisions in ordinary courts (115). The final and binding character of arbitration awards has also raised concerns with due process at the arbitration hearings. Both these

113) See the section on the NLRB in Chapter II.

114) St. Antoine 1984: 269.

115) On the "precedent value of awards" see Elkouri and Elkouri 1985: 414-436.

tendencies make arbitration less informal and more judicial. This judicialization of grievance arbitration is partly a response to pressures which stem from the invisible third person present at the arbitration stage, i.e., the public and the state.

Grievance procedures and grievance arbitration are embedded in state policies which show residual corporatist aspects. The development of private grievance arbitration and the tripartite interactions of the labour administrations rest on networks of mutual exchange among the three collective parties. The origins of the present grievance procedures date back to a specific form of tripartite cooperation in the World War II War Labor Board which encouraged reluctant managers to accept collective bargaining in exchange for no-strike agreements and grievance procedures. The Board's administrators were trained as arbitrators by the state and thereafter moved on to private positions as leading scholars, mediators and arbitrators (116). It was the conscious decision of U.S. policy-makers after WW II to adopt a system of private justice at the workplace. This system can be legitimately called passive corporatism because the state, although remaining in the background, closely monitors private bargaining and grievance handling and offers support through NLRB, FMCS and various state labour agencies. It is only in strike situations which are considered national emergencies that the federal state becomes a visible actor in industrial relations and actively intervenes with federal injunctions. However, if the procedure ends without finding a resolution, the parties are left with the option of a resort to violent action which may in turn provoke the use of military force, e.g. the National Guard. Under the Railway Act the National Mediation Board suggests voluntary tripartite arbitration in case of railway strikes before an emergency procedure is

116) Kochan, McKersie and Katz 1986: 32.

initiated. This arbitration, however, is also not binding (117).

Grievance arbitration panels are also sometimes composed of a tripartite bench. Although most arbitration hearings are held before a single neutral "ad hoc" arbitrator there are tripartite arbitration boards with a neutral arbitrator, and equal representatives from labour and management; in some industries (e.g. steel, automobile, and aircraft) there are permanent umpires (118).

Britain: "Bargained Corporatism"

It has often been suggested that the major effect of introducing a judiciary for labour conflicts in Britain has been its "collateral" impact on the establishment of grievance procedures at the company level (119). Government activities create the "shadow" in which dismissal procedures are established and in which they operate. These procedures are not so much a product of voluntary industrial relations, but rather have been established after the introduction of a state conciliation service and the issuing of a "Code of Practice" in industrial relations, first by the Department of Employment and then by ACAS.

Dismissal and disciplinary procedures show a micro-corporatist character only in a minority of cases. Most of these procedures only regulate management behaviour in the case of a dismissal decision or disciplinary action. However, these procedures become micro-corporatist when they open up to joint decision-making with shop stewards.

117) St. Antoine 1985: 263/4.

118) See Elkouri and Elkouri 1985 on permanent arbitrators.

119) See Hepple 1983a: 411; Daniel and Stilgoe 1978; Brown 1981: 42-50.

The general character of British corporatism applies to these institutions as well. Corporatism in grievance procedures is an example of British 'bargained corporatism', i.e., "a strategy which accepts major elements of the corporatist pattern but tries to insert important aspects of a liberal collective bargaining model among them" (120). Thus management has to be willing and shop stewards have to be strong enough to reach a collective agreement in which shop stewards are granted participation rights. The incidence of corporatist joint decision-making varies in Britain from company to company. Though there is evidence for a substantial increase in the proceduralization of dismissal, the weakness of shop floor bargaining strength is reflected in the insignificant extent of joint industrial relations procedures. In 1980 only three percent of establishments surveyed had a procedure which allowed appeal to a joint-body within the establishment (121).

Nevertheless, the British state (at least until 1979) continued to foster tripartism. The directing ACAS Council, for example, shows a tripartite composition (122). Furthermore, considering the facilitative, cooperative rather than repressive character of ACAS, for an ACAS officer, to take part in bargaining at company level in a discursive fashion can be considered a case of tripartite cooperation.

Germany: "Active Corporatism"

Conciliation, mediation and arbitration institutions in Germany outside the labour courts show several forms of corporatism and tripartite structures. The arbitration

120) Crouch 1977: 262.

121) Daniel and Millward 1983 cited in Dickens et al 1985: 237.

122) Hepple and O'Higgins 1981: 79/80; Dickens 1987: 40.

committee (Einigungsstelle), which is referred to in cases of disagreement between the works council and management, has a tripartite bench. There is a "neutral chairman" who is a labour court judge in 95 percent of the cases (123). Arbitration agreements for interest conflict resolution usually establish corporatist mediation bodies composed of an equal number of members from unions and employer associations and a neutral chairman.

An aspect of active corporatism can be found with respect to so-called social plans (Sozialplan). In cases where management wants restructuring of the company which significantly affects the work force, the employer is obliged under the Works Constitution Act to enter into a company agreement with the works council (124). If companies with more than twenty employees wish to dismiss more than five employees, they have to notify the local labour administration a month in advance (125). The labour administration usually actively tries to influence management and works council to conclude a social plan during this month. The law now provides for an expedited arbitration in case the collective parties cannot agree on a social plan (126). Empirical studies of arbitration committees emphasize the importance of legal regulation and the decrease in their autonomy with respect to labour courts and labour and other social administrations (127).

Active corporatism is particularly visible in state-owned companies. Streeck (128) gives an illuminating

123) Weiss 1987: 162.

124) Sec. 111 and 112 of the Works Constitution Act.

125) In companies with more than 500 employees, management is only obliged to report mass dismissals of more than 30 employees at a time to the local labour administration. See sec. 17 of the Dismissal Protection Act.

126) Sec 112 a of the Works Constitution Act.

127) Hartmann 1987 referring to Knuth, Büttner and Schank 1983 and Oechsler and Schönfeld 1985.

128) Streeck 1984a: 56-81.

example of how the federal government forced the VW motor company (in which it was a major shareholder) to negotiate with their works council not only about planned redundancies but also about other major changes of company policy. The federal state in fact initiated a corporatist arrangement at VW by installing a managing director in 1975 who was willing to negotiate with the works council and IG Metall. In another example of corporatist crisis regulation in the German steel industry (ARBED Stahl), researchers report that unions were integrated at the leadership level into a corporatist block which pushed through the restructuring of the company with massive redundancies. In this at least part of the work force was excluded from decision-making (129).

Active corporatism is most visible in the German Codetermination Act of 1976 which grants participation to elected employee representatives at board level in companies with more than 2000 employees (130). In addition, at the national level there is some discussion whether so-called Concerted Action (Konzertierte Aktion), which aimed at restructuring and stabilizing the German economy through top level bargaining between the federal government, employer associations and the unions after 1967, led to a new type of labour law and industrial relations. Active corporatism in these forms, it is said, shows a tendency to legal pluralism rather than to dejuridification (131). The scope of "societal law" (rather than state law) is expanding and with it the extent to which law governs self-regulation (132).

129) Esser and Fach 1981; Heinze 1981; Vobruba 1983: 178-189.

130) Sec. 1 of the Codetermination Act of 1976.

131) Bonß 1980; Ronge 1983.

132) Willke 1983b.

Towards a Reflexive Law of Labour Conflict Resolution

The main aspect of reflexive labour law is the recognition of self-regulation, both of the labour law system and of other social systems. When labour law realizes its self-regulation in relation to other forms of self-regulation, it becomes able to realize the limits of regulation. However, realizing the limits of regulation enables labour law on the other hand to determine the effective scope of regulation.

A reflexive labour law concept assumes that regulation of the industrial relations system by the legal system is limited by their respective search for autonomy and their needs for self-reproduction (133). In Teubner's concept the legal system communicates with another system through mutual observation, affiliation by interference and communication about organization (134). The legal system intervenes according to its own idea of a proper industrial relations system, and the industrial relations system reacts towards the legal system according to its own perception of the legal system. Both systems are exclusively guided by their internal models of the external world. Thus, successful regulation through interference of the systems depends largely on mutual internal realization of the needs of the regulating and the regulated system.

We might ask to what extent there are signs of mutual recognition of self-regulation in the four systems under comparison. We can briefly reconsider our material with respect to the self-regulatory capacities of both the labour court and the workplace industrial relations systems, and to examples of mutual recognition of self-regulation.

133) Luhmann 1986b.

134) Teubner 1989: 96-122.

Teubner distinguishes between the conflict-resolution function of the legal system and regulation of other systems by the legal system. The autopoietic legal system encounters few problems in solving societal conflicts because it can remain in its boundaries of self-regulation in applying its devices (norms, procedures and legal doctrine) to process the conflict. Problems arise mainly with demands on the legal system to regulate other social systems (135).

The line between conflict resolution and regulation as two distinct functions of procedure is not always easy to draw. Indeed, whether conflict resolution also means regulation, depends on the scope of the conflict, the characteristics of disputants involved and the issues of the conflict.

However, in most labour law systems the distinction between conflict resolution and regulation of industrial relations matters plays an important role. In conflict resolution, furthermore, disputes arising from individual employment contracts have to be distinguished from collective labour conflicts related to disagreements in collective bargaining. Individual employment conflicts are generally considered social problems which require legal treatment in a legal or judicial procedure. Collective or interest disputes are in most countries explicitly exempted from judicial treatment and left to be solved and regulated by the industrial relations system.

The distinction between individual employment conflicts and collective labour conflicts is expressed in the distinction of institutions of labour conflict resolution. Arbitration procedures for collective conflicts form part of the immune system of the industrial relations system. Labour courts, on the other hand, are judicial bodies for

135) Teubner 1989: 88-89.

employment disputes which belong to the institutional structure of the legal system.

Labour courts as autopoietic systems have to achieve some degree of autonomy. Hubert Rottleuthner has analyzed the external differentiation of the German labour court system. He concludes that the German labour court system is autonomous "gegenüber dem sozio-ökonomischen und dem sozio-kulturellen Umfeld, nicht aber gegenüber dem politischen, rechtsetzenden System. Hier gelingt seine Ausdifferenzierung in dem Maße, indem die Gerichte keine (probably a printing error; the meaning of the sentence suggests "eine", R.R.) eigenständige Rechtsfortbildung betreiben" (136).

Rottleuthner rightly emphasizes the judicial function of labour courts. Once labour courts are established as part of the judicial system, their autonomy depends on successful self-regulation of the area of law for which they are responsible. This means that the labour courts have to be active in forming the labour law. For this purpose they can benefit from regulations achieved in the industrial relations system.

Labour courts thus recognize self-regulation of the industrial relations system in a variety of ways. However, they do so for their own purposes of extending legal autonomy in their fields of law. There are several examples of how labour courts try to instrumentalize industrial relations procedures for their purposes.

In their formative period in the 1970s, British Industrial Tribunals went beyond mere recognition of industrial self-regulation and actively endorsed and directly controlled the employer's use or non-use of dispute procedures; they developed a reasonableness test linking the

136) Rottleuthner 1984: 355.

judgement of dismissals to procedural fairness (137). The Court of Appeal reversed this line of decision-making, thereby arguing that such a direct linkage would lead to formalistic results (138). In fact, the courts stopped the instrumentalization of company procedures for purposes of judicial decision-making and this can be seen as enhancing the autonomy of industrial relations decision-making.

German labour courts also engage in active recognition of other forms of regulation. In the conciliation phase and during conciliation attempts at the hearing, the labour courts often propose a solution which suits the regulation of the unemployment agency to secure the dismissed employees an immediate payment of unemployment benefits, and to adopt the agency's view as terms of the settlement. However, labour courts encourage the reference to an absent third party in their own interest. The judges can more easily convince the parties to agree to a settlement when there is an option of calling in a third party. And settlements relieve the court of the obligation to formulate a decision.

The aim of reflexive labour law is twofold: a self-critical assessment of legal developments relating to doctrinal issues and operations of labour courts; and a description of self-regulation in industrial relations. Reflexive law in general claims to enlighten the legal discourse with socio-legal information in order to assess critically legal perspectives on reality. In accordance, reflexive labour law discusses the legal construction of industrial relations reality. For this purpose it obtains information from industrial relations and socio-legal

137) *Earl v. Slater and Wheeler (Airlyne) Ltd.* [1972] ICR 508.

138) See especially *British Labour Pump Co. Ltd. v. Byrne* [1979] ICR 347. The negative effect of this decision on dismissal procedures at company level was acknowledged by the House of Lords in the decision *Polkey v. Dayton Services Ltd.* [1988] ICR 142, which reversed *British Labour Pump*.

research on regulatory and self-regulatory processes in industrial relations. Some information gathered in Chapters II and III can be assessed with respect to these self-regulatory processes.

American-style grievance arbitration provides many examples of the consequences of autonomous self-regulation by collective actors at the workplace. Issues handled by these negotiation systems have to become collectivized. This system maintains its autonomy through control over the input. The major legal and organizational obstacles to handling individual employment conflicts in grievance procedures are related to the representation of individual interests.

In his critical assessment of U.S. grievance procedures and grievance arbitration, Herding reports that procedural rights were found to be largely ineffective and eroding: "In the grievance and arbitration procedure, waves of 'efficient', low-level, relatively speedy settlements with substantial success in arbitration are succeeded by those of obstinate day-to-day bargaining including strife for expanding contractual rights, which result in long delays, high-level settlements, and little success in the unambiguously non-expansive step of arbitration. ... the grievance machinery ... turns into a conflict-evading rather than conflict-settling strategy" (139).

The U.S. labour law system has imposed a duty of fair representation on union representatives in grievance procedures. However, the collective character of the grievance process unavoidably leads union representatives to adopt a view that they "own" the individual grievances. Much of the criticism of grievance handling in U.S. grievance procedures relates to this intertwinement of the enforcement of collective issues and of individual rights,

139) Herding 1972: 212-213.

which are both granted in the collective bargaining agreement. The tension between individual rights and collective interests thus constitutes the structure of the U.S. grievance procedure.

In Germany this tension is solved by large-scale abstentionism of works councils from unequivocal representation of dismissed employees. This self-restraint of representative bodies in fact means delegation of dismissal matters to the labour courts, which are seen as the appropriate bodies for handling of these cases. Although labour courts have many jurisdictions over employment conflicts, in fact, in the vast majority of cases, they only handle conflicts after the employee has involuntarily or voluntarily left the job. 91 percent out of the already high number of almost 400,000 claims brought each year to the German labour courts derive from broken employment relationships (140). Thus Falke concludes convincingly: "Die Funktion des Gerichts ist vorwiegend, den Abbruch von Sozialbeziehungen zu regeln, nicht aber, deren Aufrechterhaltung zu erreichen." (141).

Disputes in continuous employment are thus most often handled either in informal negotiations at the company level or resolved by one or another form of self-help, i.e., deviant behaviour or avoidance. The real dangers attached to the delegation strategy of works councils in these matters lie with those cases in which employees in fact want to continue employment despite the breach in the social relationship. Thus far they get very little support indeed from either their elected representatives or the labour courts (142).

140) Reported by Kohte 1981: 49. See also Diekmann 1984: 83.

141) Falke 1984b: 132.

142) Höland 1985, Linne 1984.

Although the German approach can hardly be criticized for lacking institutionalization of self-regulatory mechanisms, it nevertheless encounters problems of representation of individual employees similar to those in France. Works councils largely underexploit their potential power in employment protection compared to a relatively greater engagement of American local union representatives in grievance procedures. Since works councils are integrated into company management by means of their co-determination rights, individual complaints are largely delegated to the external judicial forum of the labour court.

Self-regulation of individual employment conflicts that delegated protection of individuals, now carried out by judiciaries, to the workplace industrial relations system would require procedures different from most of the present integrated collective negotiation systems. Collective parties in all four countries engage in trade-offs, creating a web of commitment and trust relations, which, in West Germany for example, have the effect that works councils exchange leniency in personnel matters for participation in economic decision-making, which they consider more important. Unequivocal representation of individual interests is hardly possible under these conditions. It would therefore require special grievance committees for joint decisions of these conflicts if continued employment in the company is desired either in the same job or in another capacity.

The French system of grievance procedures demonstrates a particular weakness with respect to self-regulation. Self-regulation at the shop floor traditionally had to rely on outside intervention to regulate matters of workplace industrial relations. The institutional boundaries and jurisdictions between the three main representative bodies at the shop floor (personnel delegates, enterprise

committees and union sections) led to competition and factionalism which decreased the efficiency of employee representation against management (143). However, this has been changing since the reforms of the 1980's.

Nevertheless, the French system still lacks strong self-regulation. In a comparison with American grievance procedures, Renaud mentions that the vagueness of the French procedural standards puts the delegates in a position to oppose management on principle (144). In his view, the American grievance procedure allows for more detailed treatment of individual cases and is thus more flexible and pragmatic. Both the formal principle of seniority, which is easy to implement, and the nature of American grievance procedure as an institutionalized form of collective bargaining (continuous bargaining) is interpreted as superior to the French system. In this account French workplace industrial relations would improve through institutional stabilization of negotiations at the enterprise level. Due to the "loi Aroux" of 1982 and other legislation in the 1980s which supported collective bargaining in workplace industrial relations (145), French industrial relations are now experimenting with forms of self-regulation (146). The recent reforms adopted the strategy of strengthening self-regulation and employment conflict resolution at the company level in France through the reduction of competition among the representative bodies in French companies and restriction of the powers of the labour inspector. However, the role of union sections is still not entirely clear. They could, for example, adopt a new role in handling discharge cases at the company level and in negotiating over company agreements with management (social plan). This body seems well suited to performing

143) See also Nagels and Sorge 1977: 99; Weiss 1973: 275f..

144) Reynaud 1975: 245-7.

145) On intentions of the labour law proposals of the Mitterand era see Javillier 1981.

146) Goetschy and Rojot 1987.

the role of an independent and unyielding representative which, in so doing, also promotes industrial self-regulation.

British industrial relations are said to have largely recognized the new labour law system and the Industrial Tribunal system. As an indicator for this, industrial relations research usually points to the adoption of formal dismissal procedures. However, these procedures are not joint decision-making procedures, as already mentioned on various occasions. Union involvement in dispute procedures occurs only in negotiations over the introduction of these procedures and in representation of members who are about to be disciplined or dismissed. Participation in determining the issue and applying sanctions is the rare exception (147). Nevertheless, the still low number of complaints with the Industrial Tribunals (only one tenth of the caseload of German labour courts) suggests that several conflicts which in France or Germany go to the labour court are settled in one way or another at the company level.

A comparison of the degree of self-regulation in the industrial relations systems can be summarized as follows. The French system is still characterized by a low capacity for self-regulation, although this is rapidly changing. The American system, in contrast, which favours private company grievance procedures with final and binding arbitration, formally shows the highest degree of autonomy in self-regulation of dismissals at the plant level. However, with the decline of unionism these negotiation systems at the plant level are severely threatened. The British system can be characterized as a dual approach; it fosters voluntary grievance procedures through official conciliation but it also threatens employers with Industrial Tribunals, which judge managerial behaviour in dismissal situations based on fairness standards agreed upon by their peers. The German

147) Dickens et al. 1985: 237.

system relies from an early stage in the dispute resolution process on judicial procedures and favours adjudication over other forms of dispute resolution; self-regulation of labour conflicts at the company level distinguishes strictly between employment conflicts related to broken employment relationships and continuing employment relationships (148).

The reflexive law perspective can contribute to the debate on the transfer of industrial relations rules between national industrial relations and labour law systems. Comparative industrial relations research has from its beginning struggled with the demands of international and national policy-makers for ways to design industrial relations policies and to legitimize international transfer of these policies. The International Labour Organization in Geneva is the major body to promote the harmonization and universalization of industrial relations regulations by enforcing minimum standards of industrial relations conduct and employment protection. Dunlop's comparative approach, for example, implicitly fosters the idea of the modernization of industrial relations rules and institutions according to universal patterns. However, he is also a good example of the opposition which the ILO has encountered, especially from U.S. industrial relations research. Dunlop remains astonishingly skeptical about the international transfer of rules and procedures (149).

Otto Kahn-Freund, the eminent comparative labour lawyer, was more optimistic with respect to the transplantation of industrial relation rules. Kahn-Freund distinguished between individual and collective labour relations rules and procedures, strongly warning against transplanting collective bargaining institutions and rules. Since these are closely linked to the structure and organization of political and social power within their own

148) Kochan, Katz and McKersie 1984, cited in Kerr and Staudohar 1986: 395/6.

149) Dunlop 1958: 27.

environment, they cannot be expected to function adequately when wrenched out of their original context and implanted elsewhere. However, labour relation rules and procedures relating to individual workers, he thought, could be transplanted relatively straightforwardly. According to Kahn-Freund, comparative research on procedures relating to individual workers is less likely to be misused in political debates when reforms of industrial relations systems are intended (150).

In a systems theoretical view, Kahn-Freund has simply separated the industrial relations context from the legal context and its rules. From the industrial relations systems point of view, the legal protection of individual employees remains relatively external to the industrial relations system as a system based on recursive collective communications. It is an affair more or less confined to the legal system and thus is easier to "harmonize" among nations than the rules directly related to vital processes of collective communications. Thus Kahn-Freund's statement can be read as the statement of a comparative lawyer who sees little resistance in national legal systems to the harmonization of labour law norms because of the relatively marginal nature of labour law within national legal orders.

Industrial relations researchers are rarely able to influence political processes directly; Kahn-Freund was a notable exception in this respect because of his outstanding personal reputation as a legal scholar which was recognized even outside the legal academia in British politics and industrial relations (151). The political process in general uses or misuses industrial relations research, uncontrolled by researchers, as Kahn-Freund clearly saw

150) Kahn-Freund 1974. Bean 1985: 5.

151) See Clegg 1983 on Kahn-Freund's influence on British industrial relations policies and Wedderburn 1983 on Kahn-Freund's impact on British labour law.

(152). Comparative industrial relations have to distinguish between their political purposes and the academic intentions, and thus have to define themselves clearly as an academic discipline of comparative industrial relations research in order to survive. Roy Bean sees this clearly when he insists that the overriding purpose of comparative industrial relations research is primarily academic and not its relevance for any practical policy implications (153). His approach is superior to competing approaches in industrial relations that naively think that it is possible mechanistically "to graft industrial relations practices derived from one country to another" (154).

We can now return to the topic of self-regulation for some final observations. Legally, the idea of self-regulation rests on two pillars: collective bargaining and the settlement of conflicts in self-created procedures which solve the conflict finally and bindingly. Interest conflicts are, in all countries under comparison, self-regulated in this sense. With respect to employment conflicts the concept of self-regulation has been adopted most clearly in the U.S.. In Germany only a few conflicts are handled exclusively at the company level, e.g., the resolution of so-called regulation conflicts over the interpretation of company agreements.

There is an important interplay between formal and informal negotiations. Formal rules and procedures are used as bargaining counters to secure informal negotiations (155). In fact, the more dispute or grievance procedure systems develop into routine procedures of conflict resolution and into private judiciaries, the more there is a need for informal negotiations to preserve non-conflictual communication between management and employee

152) Kahn-Freund 1974.

153) Bean 1985: 7 and the concluding statement on p. 229.

154) Bamber and Lansbury 1987: 11.

155) Gouldner 1954; McCarthy 1966.

representatives. Routinized dispute procedures have to differentiate into mechanisms for conflict resolution and into institutions for joint decision-making.

Mutual recognition of self-regulation in labour conflict resolution matters has taken several forms. Labour courts largely acknowledge solutions reached at the company level. Increasingly solutions are best brought about by procedural rather than substantive legal devices. Industrial relations systems have to accept the role of labour courts in labour conflict resolution in so far as attempts to reestablish broken employment relationships are concerned. For the unequivocal representation of conflicts in continuous employment, separate, procedurally differentiated grievance committees are better equipped to handle these individual grievances than the established bodies of co-determination or collective bargaining which are dominated by collective concerns.

Decentralized decision-making, the retreat to proceduralism and mutual recognition of self-regulation in the legal and the industrial relations system are three tendencies which all enhance self-regulation through negotiations. The realization of this fact constitutes the core assumption of a conception of reflexive labour law. There is a peculiar relationship between self-regulation and third party intervention. Although autonomous self-regulation does not preclude third party intervention, it ultimately aims at direct negotiations between the parties at dispute. Conciliation, mediation, arbitration and adjudication provide the shadow in which negotiations in grievance procedures and in collective bargaining can take place. "Yet the availability of third-party services is a mixed blessing because it frequently encourages reliance on these services, making bargainers less likely to resolve their controversies on their own" (156). One disadvantage

156) Pruitt 1981: 220.

of arbitration is that the parties may come to rely on the third party to do their thinking. And the parties are less likely to adhere to a decision by a third party over the long run than to a solution endorsed by the parties themselves. Negotiation remains the preferred method of self-regulation, because the parties themselves are best qualified to assess and uphold the needs of the disputants.

The analytical distinction between conflict resolution in the legal and in the industrial relations system enables us to understand their relationship as intersystemic cooperation. It follows from the assumption of autonomous social systems with self-regulatory capacities that external regulation of labour conflict resolution through political intervention can only improve a situation if the political intentions are translated into processes of self-regulation of either the legal or the industrial relations system.

In realizing self-regulation of the industrial relations system, reflexive labour law can advance beyond a conflict-centered perspective on the procedures of labour conflict resolution. These procedures are characterized by intervention power towards collective bargaining and thus inherently promote the idea of industrial democracy. Procedures of labour conflict resolution operate in the industrial relations system and contribute in securing the autonomy of the system, either through self-reference or as an immune system. They can memorize negotiations results as results of conflict resolution.

However, the realization of other functions than conflict resolution which are attached to the procedures and operations in the industrial relations system is a main achievement of the conception of reflexive labour law. Reflexive labour law describes realistically the contribution of the law of labour conflict resolution to self-regulation of the industrial relations system. It emphasizes the limits of law and the limited role of labour

courts in this respect. However, the reflexive labour law conception can contribute to the establishment of a new view of procedures of labour conflict resolution by reconstructing processes of self-regulation in the industrial relations system and the legal system. These procedures of joint decision-making may well contain the potential to become the essential elements of a modern concept of the corporation which is conceived as a network of micro-corporatist arrangements and collective negotiation systems.

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